(1)

Supreme Court, U.S.
FILED

01 828 OCT 23 2001

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

James R. Grogan and Nate's Cafe Inc.,
Petitioners,

v.

City of Cincinnati, ex rel. Terrence R. Cosgrove, and the State of Ohio, ex rel. Berry D. Montgomery,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

HAROLD G. KORBEE
Counsel of Record
C.J. SCHMIDT
WOOD & LAMPING LLP
600 VINE STREET
SUITE 2500
CINCINNATI, OH 45202
(513) 852-6000

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

133 pp

Questions Presented For Review

1. Does Ohio Revise Code § 3767.06(A), which permits the closure and pad-locking of property found to be a public nuisance, violate the Fifth and Fourteenth Amendments to the United States Constitution when applied to close and padlock a commercial establishment located in a high crime area which is open to the public, where the owner of the establishment has taken reasonable steps to abate the behavior which forms the basis of the alleged nuisance, has not acquiesced thereto, yet proves unsuccessful in completely eradicating such behavior?

2. Is the Due Process clause of the Fourteenth Amendment of the United States Constitution transgressed where the state, pursuant to Ohio Revised Code § 3767.06(A), a nuisance abatement statute, padlocks an owner's premises without first providing the owner with notice or an opportunity to be heard where the unrebutted evidence establishes the complete and total absence of exigent circumstances?

3. Is the Due Process Clause of the Federal Constitution's Fourteenth Amendment further offended where the provisions of R.C. 3767.04(B)(3), mandate the grant of a preliminary (or "temporary") injunction thereby increasing the length of time within which the deprivation of the property interest continues unchallenged, where the defendant requests additional time within which to prepare for the preliminary injunction hearing.

Parties to the Proceeding and Corporate Disclosure Statement

The parties to the present proceeding are as follows:

1. Jerome R. Grogan
   1829 Race Street
   Cincinnati, Ohio 45210

2. Nate's Cafe Inc.
   1829 Race Street
   Cincinnati, Ohio 45210

3. Betty D. Montgomery
   Attorney General for the State of Ohio
   30 East Broad Street
   Columbus, Ohio 42315

4. Terence R. Cosgrove
   City Prosecutor, Cincinnati, Ohio
   801 Plum Street
   Cincinnati, OH 45202

Statement of Corporate Disclosure

Petitioner Nate's Cafe Inc. is a corporation organized under the laws of the state of Ohio. There is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceeding and Corporate Disclosure Statement ii

I. Opinions Below viii

II. Statement of Jurisdiction viii

III. Statutory Provisions Involved viii

IV. Statement of the Case and Procedural History . . 1

Procedural Posture 1

Facts 3

V. Argument 7

Does Ohio Revise Code § 3767.06(A), which permits the closure and pad-locking of property found to be a public nuisance, violate the Fifth and Fourteenth Amendments to the United States Constitution when applied to close and padlock a commercial establishment located in a high crime area which is open to the public, where the owner of the establishment has taken reasonable steps to abate the behavior which forms the basis of the alleged nuisance, has not acquiesced thereto, yet proves unsuccessful in completely eradicating such behavior? 7

Is the Due Process clause of the Fourteenth Amendment of the United States Constitution transgressed where the state, pursuant to Ohio Revised Code § 3767.06(A), a nuisance abatement statute, padlocks an owner's premises without first providing the owner with notice or an opportunity to be heard where the unrebutted evidence establishes the complete and total absence of exigent circumstances? 21

Is the Due Process Clause of the Federal Constitution's Fourteenth Amendment further offended where the provisions of R.C. 3767.04(B)(3), mandate the grant of a preliminary (or "temporary") injunction thereby increasing the length of time within which the deprivation of the property interest continues unchallenged, where the defendant requests additional time within which to prepare for the preliminary injunction hearing 21

VI. Conclusion 30

Appendix 1a

A. Opinion of Supreme Court of Ohio denying discretionary appeal 1a

B. Decision of the Court of Appeals for the First District of Ohio 3a

C. Findings of Fact and Conclusions of Law as articulated by Trial Cou 43a

D. Final Judgment Entry of Trial Court 59a

E. Trial Court's decision granting state's Motion for Summary Judgment 62a

F. *Ex Parte* Restraining Order Granted by trial Court 02/25/99 . . . . . 79a

G. O.R.C. § 3767.03 . . . . . 87a

H. O.R.C. § 3767.04 . . . . . 89a

TABLE OF AUTHORITIES

Cases

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663, 94 S.Ct. 2080 (1974) 9

First English Evangelical Lutheran Church v. Los Angeles County,
482 U.S. 304, 107 S.Ct. 2378 (1987) 8

Lucas v. South Carolina Coastal Council,
505 U.S. 1003, 112 S.Ct. 2886 (1992) 8

Lujan v. G&G Fire Sprinklers, Inc.,
121 S.Ct. 1446 (2001) 23

Mathews v. Eldridge,
424 U.S. 319, 96 S.Ct. 893 (1976) . . . 27, 28, 29

State of Ohio, ex rel., Pizza v. Rezcallah,
84 Ohio St. 3d 116, 702 N.E.2d 81(1998) . passim

Seattle v. McCoy,
4 P.3d 159 (Wash. Ct. App. 2000) . . 8, 11, 15, 17

State v. Bobo (1988),
37 Ohio St. 3d 177, 524 N.E.2d 489 24

State v. Burnett,
93 Ohio St. 3d 419 (2001) 3, 18

Terry v. Ohio (1968),
392 U.S. 1, 88 S.Ct. 1868 24

United States v. James Daniel Good Real Property,
510 U.S. 43, 114 S.Ct. 492 (1993) . . . 22, 23, 25

United States v. Morgan,
743 F.2d 1158 (6th Cir. 1984) 24

Statutes

O.R.C. §3767.01, *et seq* 8, 9
O.R.C. §3767.03 . . . . . passim
O.R.C. §3767.04 . . . . . ix, 25, 26, 28
O.R.C. §3767.04 (B)(3) . . . . . passim
O.R.C. §3767.04(B)(1) 26, 27
O.R.C. §3767.04(B)(2) 26
O.R.C. §3767.04(C) 1, 26
O.R.C. §3767.06(A) . . . . . i, 7, 9, 10, 21

Other Authorities

U.S. Const. amend. V ix

U.S. Const. amend XIV, § 1 ix

WEBSTER'S NINTH NEW COLLEGIATE
DICTIONARY, 52 (9th Ed. 1988) 15

Rules

Ohio R. Civ. P. 65 . . . . . 22, 25, 27

I. Opinions Below

The findings of fact and conclusions of law of the Hamilton County Court of Common Pleas, *Cincinnati ex rel. Cosgrove v. Grogan* Case No. A-9900996, as recited into the record are shown as Appendix C. The decision of the Court of Appeals for the First Appellate District of Ohio in *Cincinnati ex rel. Cosgrove v. Grogan,* Case No. C-000221, 141 Ohio App. 3d 733,753 N.E. 2d 256 (2001) is shown as Appendix B. This decision affirms in part and reverses in part the decision of the trial court. The entry of the Supreme Court of Ohio denying discretionary review, *Cincinnati ex rel. Cosgrove v. Grogan,* 751 N.E. 2d 481 is shown as Appendix A.

II. Statement of Jurisdiction

Petitioner seeks this Court's review of a judgment entered on March 16, 2001 by the Court of Appeals for the First District of Ohio, over which the Supreme Court of Ohio declined to grant discretionary review, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. § 1257. This Petition is timely filed because it was mailed within ninety days of July 25, 2001, the date the Supreme Court of Ohio declined to accept jurisdiction over the issues raised by Petitioner in the present Writ.

III. Statutory Provisions Involved

(a) The Fifth Amendment to the United States Constitution which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment ora grand jury,

except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

(b) The Fourteenth Amendment, Section One to the United States Constitution which states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

(c) Ohio Revised Code § 3767.03 which is fully set forth in Exhibit G.

(d) Ohio Revised Code § 3767.04 which is fully set forth in Exhibit H.

(e) Ohio Revised Code §3719.10 which states:

Premises or real estate, including vacant land, on which a felony violation of Chapter 2925 or 3719 of the Revised Code occurs constitute a nuisance subject to abatement pursuant to Chapter 3767 of the Revised Code.

IV. Statement of the Case and Procedural History

A. Procedural Posture

On February 25, 1999, appellees City of Cincinnati, ex rel., City Prosecutor Terrence R. Cosgrove and State of Ohio, ex rel., Attorney General Betty D. Montgomery (hereinafter collectively referred to as "the state" or as "Cincinnati") filed this action against respondents-appellants Jerome J. Grogan and Nate's Cafe, Inc. (hereinafter collectively referred to as "Grogan") alleging that Grogan maintained a nuisance as defined by R.C. §3719.10 and requesting that the Court padlock the property located at 128 West Elder Street known as the Elder Cafe pursuant to R.C. §3767.03. With no notice to Grogan, on February 25, 1999, the Court granted the state's *Ex Parte* Motion for Temporary Restraining Order of Cincinnati. Cincinnati then seized and padlocked the Elder Cafe on February 25, 1999.

On March 18, 1999, Grogan requested, pursuant to R.C. §3767.04(C), that the Court allow him to post a bond and permit him to reopen the Cafe. Pursuant to statute, Grogan, in the context of the bond hearing, presented to the court a proposal for the abatement of the perceived nuisance. The trial court refused to permit Grogan to post a bond in order to reopen the Elder Cafe and attempt the implementation of his abatement plan. (Order Denying Motion to Post Bond, T.d. 15). The Court noted that the Elder Cafe was located in a "high crime area" into which drugs readily flow, yet based its decision in large part on its perception that the abatement steps proposed by Grogan could not definitively "end the problem." Neither the Court nor the state provided an alternative abatement plan nor did either explain precisely what steps Grogan might take to eradicate the perceived nuisance. In light of this decision, counsel for

Grogan requested additional time within which to prepare for the hearing as to the preliminary injunction. The trial court, as was required by R.C. 3767.04 (B)(3), granted the preliminary injunction without hearing in light of Grogan's request for additional time to defend the action.

On March 31, 1999, Grogan answered the state's complaint and counterclaimed against Cincinnati alleging that Cincinnati violated 42 U.S.C. §1983 for its unconstitutional seizure and forfeiture of property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and §19, Article I of the Ohio Constitution. Grogan also alleged that Cincinnati violated R.C. Chapter 718 and 26 U.S.C. §6103, *et seq.*, by disclosing tax returns of Nate's Cafe without its consent. The trial court granted summary judgment in favor of the City on Grogan's counterclaims, including those alleging violations of the Fifth and Fourteenth Amendment to the United States Constitution, and denied all other motions.

On March 24, 2000, after a two-day bench trial, the trial court held that property located at 128 West Elder Street was a nuisance as defined by R.C. §3719.10, permanently enjoining Grogan from maintaining the nuisance at the location and padlocking the property for an additional year, that is, March 14, 2000 to March 13, 2001. Grogan filed a timely notice of appeal and subsequent Appellate Brief. Grogan's first and second assignments of error charged that the trial Court had erred in failing to concluded that the *ex parte* restraining order issued in favor of the state violated his Constitutional Rights under the Fifth and Fourteenth Amendments. (*See* Brief of Appellant filed on September 17, 2000). In his third assignment of error Grogan contended that the trial court had incorrectly granted summary judgment on

his claims under 28 U.S.C. § 1983 for violations of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. *Id.* On March 16, 2001, the Court of Appeals entered judgment on the appeal and affirmed the decision of the trial court in part, reversed the decision in part and remanded the case. (Opinion and Judgment of Court of Appeals, Apx. B).

B. Facts

Grogan has been president of Nate's Cafe since 1993. From this time, Nate's Cafe operated a tavern called the Elder Cafe which was located at 128 W. Elder, Cincinnati, Ohio. (T.p. 1093-1094). Prior to 1993, Grogan owned and operated the Elder Cafe as a sole proprietor. (T.p. 1094). The Elder Cafe is located in the Over the Rhine district of Cincinnati. This area is fraught with crime and poverty and was the locus of the rioting that recently occurred in Cincinnati. Not surprisingly, yet unfortunately, drug activity is rampant in Over the Rhine. The problem is so severe that, in 1996, the City of Cincinnati, acknowledging that existing laws did not adequately control drug-related activity in certain districts within the city, passed an ordinance creating within City limits certain "drug free zones." *See State v. Burnett*, 93 Ohio St. 3d 419 (2001) (holding the ordinances creating such zones to be unconstitutional). Over the Rhine was designated as one such "drug free zone." *Id.* Under the ordinance, an individual arrested in a "drug free zone" for certain offenses (specifically drug-related offenses) delineated in the ordinance could be excluded therefrom for specified periods of time. *Id.*

In spite of the character of the surrounding community and the drug activity inherent therein, from 1986 until July of 1998, Cincinnati and Ohio cited the Elder Cafe only <u>once</u> for drug-related activity, and this citation was dismissed by the

Franklin County Court of Common Pleas as baseless because the Cincinnati witnesses were found to be not credible. (T.p. 1094-1096, 1098). In June of 1998, the liquor license held by Nate's Cafe came up for renewal and, to Grogan's surprise, the city of Cincinnati objected to its renewal. (T.p. 223, 1098). Prior to the June, 1998 objection by Cincinnati, the City of Cincinnati Law and Public Safety Committee had held a public hearing regarding the renewal of the Elder Cafe liquor license. (T.p. 1217). During this hearing, Cincinnati did not allege that the Elder Cafe presented a drug problem. (T.p. 1217-1220). To the contrary, Cincinnati conceded that it was not alleging that the Elder Cafe constituted a drug problem. (T.p. 1220). In July of 1998, a separate hearing was held before the Ohio Department of Liquor Control regarding the renewal of the license. During the hearing, Cincinnati presented the reasons it objected to the renewal which included: (1) liquor license violations; (2) frequency of loitering; (3) excessive number of radio runs; and, (4) vice activity. (T.p. 162-165; 1195-1197).[1]

Prior to the license renewal hearing, Grogan had already instituted policies to limit improper behavior inside the Elder Cafe. (T.p. 1118). These policies included: (1) installing signs warning the public that an individual observed buying, selling, smoking or possessing drugs would be barred from the Elder Cafe (T.p. 1118-1119, Respondents' Ex. C and D); (2) maintaining a list of individuals barred from the premises for failing to follow the Elder Cafe policies including those policies regarding drugs (T.p. 1120-1121, Respondents' Ex. A); (3) hiring off-duty police officers (T.p.

[1] The one drug-related vice incident Cincinnati presented at the hearing was later found to be baseless because Cincinnati's witnesses were simply not credible (T.p. 1195-1197).

1121-1122)[2]; (4) contributing to the Findlay Market Security Fund for hiring off-duty police officers to patrol the market area (T.p. 1122-1123, Respondents' Exhibit B); (5) encouraging off-duty police officers hired to patrol the market area to walk through the Elder Cafe on a regular basis (T.p. 1123)[3]; (6) installing plate glass windows in the front of the building (T.p. 1114); and, (7) maintaining a "no-transactions" rule, that is, no sales of any items inside the Cafe by patrons. (T.p. 1149).

In light of testimony given at the license renewal hearing regarding drug activity alleged to be associated with the Elder Cafe, Grogan undertook steps to bolster his pre-existing policies regarding improper behavior within the Cafe. This was done in order to remedy any such alleged problem. (T.p. 1143). The additional steps taken by Grogan included: (1) discharging one employee; (2) installing an additional surveillance camera; (3) installing a new door with a plate glass window; (4) increasing the amount of time he spent on the premises; (5) reminding his employees that no transactions were allowed inside the Cafe[4]; (6) installing an additional sign in the front of the building warning the public that disorderly conduct would not be tolerated; and (7) installing a security mirror so employees could better observe the public. (T.p. 1143-1154; Respondents' Ex. K to brief on Appeal).

Beginning approximately one year to six months prior to the closure of the Elder Cafe, Cincinnati began to focus on

[2] Although Grogan attempted to hire an off-duty police officer by contacting Cincinnati Police Department, the Police Department refused to cooperate. (T.p. 1122).

[3] The police officers refused Grogan's request. (T.p. 1123-1124).

[4] Grogan had a rule which forbade any transactions inside the Cafe; that is, patrons were not permitted to exchange money for any reason. (T.p. 1149).

the Elder Cafe for the purpose of "building a case" to close the Cafe. (T.p. 343, 815-817). Cincinnati used covert surveillance, undercover officers and confidential informants for the purpose of investigating the alleged drug problem at the Elder Cafe. Cincinnati's witness admitted that his assignment for a year prior to the closure was to create the evidence necessary to close the Elder Cafe. (T.p. 342-343, 817). These efforts were unsuccessful; that is, no drug-related arrests were made and no drugs were recovered inside the Elder Cafe until December 30, 1998. (T.p. 836-837, Respondent's Ex. P). After December 30, 1998, Cincinnati's efforts led to the eight felony drug violations it alleges occurred on the Elder Cafe premises. (Final Judgment Entry, T.d. 100). Cincinnati and Ohio never informed Grogan or Nate's Cafe of these alleged felonies. (T.p. 86-87, 117, 119-120, 533-534, 829, 865, 875-876, 887-888, 923, 949-950, 960-961, 1157-1158). After February 12, 1999 and until February 25, 1999, no other alleged felony violations occurred on the Elder Cafe premises. (Final Judgment Entry, T.d. 100). It is undisputed that none of the alleged felonies involved Grogan or any employee of the Elder Cafe. (Verified Complaint, T.d. 2; T.p. 39-40). In fact, Cincinnati did not even suspect that Grogan or any of the Elder Cafe employees were involved in any drug activity. (T.p. 829).

On February 25, 1999, Cincinnati and Ohio obtained an *ex parte* temporary restraining order which Cincinnati prepared for the trial court and the trial court entered without modification which granted Cincinnati the discretion to close the Elder Cafe. (Temporary Restraining Order, T.d. 6, p. 5). Exercising the discretion provided for in the *ex parte* temporary restraining order, Cincinnati decided to have over twenty police officers descend on the Elder Cafe without notice to Grogan, padlock the premises, and confiscate all the property located on the premises. (T.p. 535, 1162-1163).

Because neither Grogan nor any of the employees were considered dangerous or a threat, Cincinnati did not search Grogan or any of the employee during the closure. (T.p. 831, 944, 1163). Although the twenty police officers searched the Elder Cafe, no illegal drugs were recovered. (T.p. 537-538, 837-838). Since the closure of the Elder Cafe, the drug problem in the Over the Rhine neighborhood has continued unabated and has increased. (T.p. 320, 832, 969).

V. Argument

1. **Does Ohio Revised Code §3767.06(A), which permits the closure and pad-locking of property found to be a public nuisance, violate the Fifth and Fourteenth Amendments to the United States Constitution when applied to close and padlock a commercial establishment located in a high crime area which is open to the public, where the owner of the establishment has taken reasonable steps to abate the behavior which forms the basis of the alleged nuisance, has not acquiesced thereto, yet proves unsuccessful in completely eradicating such behavior?**

The decision of the Ohio Court of Appeals impermissibly shifts the responsibility for the efforts to combat the drug trade from the state and municipalities to individual property owners. The decision, in direct contravention of the Fifth and Fourteenth Amendments to the United States Constitution, requires the owner of an establishment open to the public to accomplish the impossible task of identifying, interdicting and preventing all drug activity. If he fails to do so, he will be deemed to have "acquiesced" to a nuisance created by such drug activity and his property will be subject to closure even though he took

reasonable steps to eliminate the nuisance. Such a result transcends the bounds of fairness by such a large degree that it offends the Constitution.

From the outset, it must be noted that when property is closed and padlocked pursuant to Ohio's nuisance abatement statute (R.C. § 3767.01, *et seq*) such state action is subject to analysis under the both takings provisions of the Fifth Amendment and the Due Process component of the Fourteenth Amendment to the United States Constitution. As to takings, this Court has specifically stated that a compensatory taking occurs where state regulation "denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886 (1992). Likewise, "[t]emporary takings are subject to the same categorical treatment as permanent takings where the regulation denies all use of the property." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318, 107 S.Ct. 2378 (1987). However, under what has come to be known as the "nuisance exception" the state can resist compensation only if the regulation proscribes use interests that were not part of the owner's title to begin with. *Lucas*, 505 U.S. at 1015.

> *The common law nuisance exception turns on whether the court finds, based on the evidence, that the owner has taken reasonable steps to abate the nuisance activity based upon the actual or constructive knowledge of the owner about the existence of the activity and/or the identity of the actor.*

Seattle v. McCoy, 4 P. 3d 159, 171. (Ct. App. Washington 2000).

Similarly, whether the application of a nuisance abatement statute to effectuate the closure and Padlocking of property will meet constitutional muster likewise turns on the culpability of the owner. As this court noted in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-690, 94 S Ct. 2080 (1974), in the context of a forfeiture proceeding, "it would be difficult to reject the constitutional claim of an owner...who proved that he had done all that could reasonably be expected to prevent the proscribed use of his property...for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Id.* Thus, both the propriety of the state's seizure of property pursuant to a nuisance abatement statute under both the Due Process and Takings analysis must be focused on the owner's knowledge of the alleged nuisance, and the reasonableness of his reaction thereto.

In *State of Ohio, ex rel., Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 702 N.E.2d 81(1998), the Supreme Court of Ohio, in evaluating the Constitutionality of the application of Ohio's nuisance abatement statute (R.C. § 3767.01 *et seq.*) affirmed this validity of this focus. The court held:

> *To the extent that R.C. 3767.06(A) requires a trial court, upon a finding of a nuisance, to issue an injunction closing property against its use for any purpose for one year, and to the extent that it allows release from such injunction only through the filing or renewal of a bond in the full value of the property, the statute violates the Fourteenth Amendment Due Process Clause and the Fifth Amendment Takings Clause of the United States Constitution, and Section 19, Article I of the Ohio Constitution, **when applied to an owner who did not negligently or knowingly***

> ***acquiesce to, and did not participate in the creation or perpetuation of the nuisance.*** *(Lindsay v. Cincinnati [1961], 172 Ohio St. 137, 15 Ohio Op. 2d 278, 174 N.E.2d 96, overruled.)*

(Emphasis added). The Ohio Supreme Court further stated that the padlocking of the properties on the basis of illegal acts of third parties is unconstitutional. *Id.* at 132, 702 N.E.2d at 93-94. The Court held:

> *Where an owner is subject to closure of property against all purposes for a year solely on the basis of the illegal acts of a third party over whom the owner has no legal means of control, the closure order is [unconstitutional].*

Id. The Court also concluded that it is unconstitutional to padlock the property of a property owner who is innocent of the activity allegedly constituting the nuisance. The Supreme Court held:

> *We conclude that the imposition of a closure order pursuant to R.C. 3767.06(A) effectively closing real property against its use for any purpose for a period of one year does not advance a legitimate state interest when enforced against an innocent owner and that the state's interest does not outweigh the owner's interest in the economic use of his or her property. Therefore, the mandatory closure order provisions of R.C. 3767.06(A) violate the Takings Clause of the Fifth Amendment to the United States Constitution when imposed against an innocent owner.*

Id. at 130-131, 702 N.E.2d at 93. The Ohio Supreme Court required participation in or acquiescence to the nuisance on the part of the property owner prior to padlocking a property because it is completely unreasonable and, more importantly, unconstitutional, to impose upon a property owner responsibility for the illegal acts of a third party, specifically those related to drugs, since a property owner does not have the resources, the legal means, or the ability to police the illegal acts of others. As the Court noted,

> *. . . [property owners] have no reliable way of predicting which, if any, prospective [persons] may later become involved in illegal drug activities on the [property owner's] property. Appellee Rezcallah persuasively argues that even without these legal restrictions, her limited resources for investigating or acting upon any suspicion of drug activity on her property make her "no match for the illegal drug trade."*

Id. at 92.

Not only has the Ohio Supreme Court recognized that it is unreasonable and, more importantly, unconstitutional, to impose upon a property owner responsibility for the illegal acts of a third party, but other courts have reached the same conclusion. In *Seattle v. McCoy*, 4 P.3d 159 (Ct. App. Washington 2000), the state brought a nuisance action under the State of Washington nuisance laws seeking to close down respondents' business, because third parties conducted drug transactions on the premises. The defendants, the McCoy's owned and operated a restaurant and lounge called "Oscars" which plaintiffs claimed were nuisances because drug transactions occurred on the premises. Plaintiffs conceded that defendants had not engaged in any of the alleged drug

activity. Prior to the closure, police officers had made 18 undercover drug purchases inside the restaurant and lounge. Plaintiffs did not inform defendants of the purchases, although prior to filing the suit, plaintiffs did inform the defendants that illegal drug sales were occurring on the premises and that it was defendants' responsibility to operate the business in a manner which did not allow drug trafficking to occur on the premises. That is, to avoid the penalty of closure, the property owner was charged with wholly eliminating the drug problems giving rise to the nuisance claim. The trial court ordered the premises padlocked and defendants to vacate the premises for one year, and not to reenter for any purpose for one year.

On appeal, the court reversed and held that the closure order was a taking under the Fifth Amendment to the United States Constitution, the court also noted that the closure of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In reaching its decision, the court relied upon the Ohio Supreme Court decision in *Rezcallah*, stating:

> *The Ohio court [Rezcallah] noted the landlord's lack of authority to search tenants for drugs. The McCoys similarly lacked that authority. Neither the Ohio landlords nor the McCoys had any reliable basis to predict which people coming in the door would later become involved in illegal drug activity.* ***Neither the landlords in Ohio nor the McCoys have legal authority nor resources to investigate that would make them individually a match for the illegal drug trade.*** *However, in both cases the owners excluded the people engaged in illegal drug activity when that activity and those persons became known to*

them, and remained willing to do so in the future.

Id. at 838 (Emphasis added).

In response to the trial court's finding that the McCoys were unable to immediately eliminate all drug activity on the premises, the court, noting the impossibility of meeting such a requirement stated:

> *The trial courts findings are not surprising Constitutional rights protect individuals, including business patrons, from searches and surveillance necessary for such a guarantee. Prisons and jails cannot make such guarantees even with strip searches, body cavity searches, drug detection dogs, camera surveillance, and guards.* ***It certainly cannot be presumed possible that owners of restaurants, bars, department stores, office buildings and civic arenas can guarantee that they will detect every incident of illegal drug activity, let alone prevent it. To believe otherwise would require a presumption that an owner could see through clothes, tables, walls and doors, as well as to read minds. Indeed, law enforcement cannot guarantee what the McCoy's were being asked to guarantee.***

Id. at 832 (Emphasis added). The Court further noted the reality that:

> *no evidence suggests that the illegal drug activity at Oscar's originates there. It may be conducted there, but it comes and goes with the patrons...the closure of Oscar's would move the illegal drug activity out of that*

> *building, but there is no evidence that it would stop the activity. There is no evidence it would even move the activity out of the general vicinity.*

Id. at 841. Thus, the court noted the impropriety of imputing such a pervasive drug problem onto a single establishment open to the public. The court concluded that the steps taken by the McCoy's to discourage drug activity in their establishment were sufficient to demonstrate that they had not acquiesced to the problem. These steps included cooperation with the police and the posting of a sign prohibiting drug activity. *Id* at 173. The owners had also hired security and banned suspected drug traffickers from Oscar's. *Id* at 820-822. The court, in accord with the *Rezcallah* standard, concluded that, in light of such steps, and given the nature of the surrounding community, closure would prove unduly oppressive and would violate the constitution.

In the present case, the Court of Appeals held that there was "competent credible evidence" to support the trial court's conclusion that, under the *Rezcallah* standard, Grogan had acquiesced to the drug activity at issue, and was thus properly subject to the abatement statute. This conclusion completely misses the mark. The Court of Appeals reached their conclusion even though it conceded that Grogan took reasonable steps to abate the nuisance but such steps were unsuccessful.

The trial court agreed that Grogan took steps to eliminate the drug problem. (T.p. 1326). However, it held that Grogan acquiesced in the drug problem because his efforts did not succeed. (T.p. 1327-1328). In fact, the trial court found that Grogan acquiesced because he did not ensure 100% elimination of the drug problem in the neighborhood.

(T.p. 1327-1328). The trial court also concluded that it "would have been impossible to abate the nuisance," that is, eliminate drugs from a drug-ridden neighborhood. (T.p. 1328). In spite of this acknowledgment, this was the burden Grogan was required to meet in order to prove that he had not acquiesced to the alleged nuisance. Such a conclusion was incorrect as a matter of law. The Court of Appeals should have recognized as much.

The courts in *Rezcallah* and *Seattle v. McCoy*, properly noted that the a nuisance abatement statute will violate both the Due Process clause of the Fifth Amendment's takings provisions where it is applied against one who bears no culpability for the alleged nuisance. Thus, if one does not create, perpetuate or knowingly or negligently acquiesce to the alleged nuisance, his property may not be subjected to closure. Such a rule protects all citizens from undue oppression at the hands of the state. However, in the present case, the courts below have set the bar untenably high with regard to the definition of acquiescence so that this protection is effectively eviscerated.

To "acquiesce" means "to accept or comply tacitly or passively." Webster's Ninth New Collegiate Dictionary, 52 (9th Ed. 1988). In this case, Grogan did not knowingly or negligently acquiesce in the nuisance because the evidence established that he did not accept nor he comply tacitly or passively in the nuisance, that is, the illegal drug activity of third parties. First, the evidence established that Grogan had no knowledge of the specific felonies which formed the basis of the abatement action. Cincinnati did not inform Grogan of these alleged felonies. What's more, it would have been impossible for Grogan and to have learned of these events absent such notification. For example, one of the individuals arrested for a felony drug offense, Tyrone Mallory, would

only conduct the alleged drug transaction at issue in the men's room in order to conceal the transaction from any observers. (T.p. 915). In fact, Mallory refused to conduct the alleged transaction in the open. (T.p. 915, 919-920). Mallory was arrested and searched outside of the Elder Cafe and charged with drug trafficking.

In another one of the arrests, Cincinnati Police had the Elder Cafe subject to covert surveillance when police officers observed an individual in what appeared to be a drug transaction on the public street. (T.p. 424-425). After the subject entered the Elder Cafe, the police entered the Elder Cafe and searched for him and located him in the men's room. (T.p. 425). The individual was then detained by the police, escorted outside, searched and placed under arrest after the police located three bags of marijuana in Lee's shoe. (T.p. 425-426, 1159, 1160). Finally, in yet another of the arrests that formed the basis of the nuisance abatement action, Cincinnati police officers arrested Alonzo Robinson two blocks from the Elder Cafe for aggravated possession heroin. (T.p. 820-821). The suspected drug transaction that Robinson engaged in did not take place inside the Elder Cafe. (T.p. 822-823). Robinson had the heroin concealed in a pocket sewn in his hat. (T.p. 821). The heroin was so well concealed that the arresting officer, Officer Ferenczy, missed the heroin on the first search of Robinson.

These examples are representative of all of the arrests that formed the basis of the state's nuisance abatement action against Grogan and serve to reaffirm the impossibility of the task with which Grogan was charged. Absent the ability to see through walls and clothing, to be omniscient and to read minds, it would have been virtually impossible for Grogan to even identify drug related activity (particularly mere possession of drugs). What's more, absent such super-powers,

it's safe to say that no one could effectively eliminate drug activity in an establishment open to the public. This is particularly true where such establishment is located in an area, such as the Over the Rhine district, which, by Cincinnati's own admission is overflowing with illegal and illicit drug activity.

Grogan did not "tacitly or passively accept" allegations concerning the existence of drug activity associated with the Elder Cafe either. To the contrary, the Court of Appeals conceded that Grogan had instituted policies to limit improper behavior and to eliminate any such alleged drug problem. Like the defendants in *Seattle v. McCoy*, it is undisputed that Grogan was willing to and did bar individuals from the premises who they knew to be engaged in illegal drug activity. (T.p. 1120-1121, Respondents' Ex. A). Grogan also undertook a multitude of other steps which included hiring off-duty police officers to assist with security, contributing to a security fund established by local merchants for hiring off-duty police officers to patrol the area, installing plate glass windows and door in the front of the building, maintaining a strict no transactions policy, firing one employee, and installing new security mirrors and a video camera in order to both assist Cafe employees in monitoring the clientele as well as to provide a deterrent to any potential drug transactions. Such steps were far more comprehensive than those taken by the defendants in *Seattle v. McCoy* where the court found that the owners did not acquiesce to the drug activity of third parties which formed the basis of a nuisance abatement action.

In spite of the steps taken by Grogan, however, he lacked the legal authority to search each member of the public to ferret out illegal drugs. Likewise, similar to the plaintiffs in *Seattle v. McCoy*, the state sought to have Grogan

accomplish a task that it could not itself accomplish-- prior detection of individuals engaged in illegal drug behavior. In fact, Cincinnati Police Officers testified that despite their training, it is impossible to detect whether a person is possessing illegal drugs. (T.p. 565-566). Cincinnati Police Officers also testified that despite being trained to interdict illegal drug activity, it is virtually impossible to determine whether someone is engaged in an illegal drug transaction. (T.p. 88, 114-115, 122-123, 375).

In spite of this fact, the Court of Appeals holding required Grogan to guarantee the elimination of illegal drugs from the Elder Cafe even though the elimination of illegal drugs from the neighborhood within which the Cafe was located was impossible. (T.p. 319-320, 831-832). Indeed, the City's inability to do that which it (and the court) required of Grogan was made evident when it passed an ordinance creating "drug free zones" specifically designed to remedy the complete failure of existing drug laws and the enforcement thereof. *See State v. Burnett*, 93 Ohio St. 3d 419 (2001). The Elder Cafe was located in one such zone. Thus, the Elder Cafe was located in an area acknowledged by the City to have a drug problem of epidemic proportions. In light of this fact, and given that the Elder Cafe was open to the public, how could Grogan have reasonably have been expected ensure no drugs ever entered his premises? This was an impossible task. The police officers charged with patrolling the area admitted that since the closure of the Elder Cafe, the drug problem in the neighborhood has not lessened but has actually increased. (T.p. 320, 831-832).

The need for the intervention of this Court is evident when one considers the consequences where, in the state's efforts to take property to abate an alleged drug-related nuisance, anything short of the property owner's complete

success in eradicating drug activity is deemed acquiescence. First, and perhaps most importantly, it would become frighteningly easy for the government to target, for whatever reason (political or otherwise) specific businesses for closure. This would be particularly true in poorer, crime-ridden areas that, in urban settings, often consist predominately of minority citizens. It is in these regions that our nation's drug epidemic is most persistent, pervasive and prevalent. In such areas, drug activity saturates every aspect of the community. Thus, in order to effectuate the closure of a business located in such a district, the government would need only to selectively target and prosecute, from the vast body of drug offenses being committed, those committed in a specific business. In so doing, the government's burden is alarmingly light (the allegation of drug activity) whereas the burden on the private citizen is untenably difficult. That is, to overcome the state's attempt to seize his premises, a property owner is required to demonstrate that he can eliminate a drug problem that pervades every corner, every building and every doorway in the surrounding neighborhood—a problem which the state itself cannot remedy.

In such an environment, an environment where a property owners are deemed to acquiesce to drug problems where they fail to eradicate a problem that the police cannot solve, cooperation with law enforcement will cease. That is, there will be no incentive whatsoever to report illegal drug activity to the authorities, or to assist them in combating it. Again, this is particularly true in poorer, urban, minority communities, where, as the recent riots in Cincinnati will attest, cooperation amongst police and those whom they ostensibly serve is already unacceptably tenuous. In such an environment a phone call by a business owner to the police for the purpose of reporting drug activity transforms from the act of a responsible citizen to an act of commercial suicide. In

reporting that his establishment is susceptible to the same malevolent force that has infested the rest of the community, the property owner provides the state with its first exhibit in a future condemnation action.

Finally, if the definition of acquiescence provided by the lower courts in this case is permitted to stand, it will inevitably lead to vigilante justice. Property owners will take into their own hands the task which the courts of Ohio have now placed at their doorsteps accomplish -the complete elimination of drug activity by third parties. In poor, urban areas, where violent crime is already rampant, such a rule will do far more harm that good.

This Court should assume jurisdiction over this case and clearly articulate that, under both the Due Process Clause of the Fourteenth Amendment and the Takings clause of the Fifth Amendment to the United States constitution, the ability of a property owner to defeat the state's attempt to close and padlock his property pursuant to R.C. 3767.03 cannot be conditioned on his ability to totally eradicate drug related offenses that the state itself cannot adequately control.

2. **Is the Due Process clause of the Fourteenth Amendment of the United States Constitution transgressed where the state, pursuant to Ohio Revised Code § 3767.06(A), a nuisance abatement statute, padlocks an owner's premises without first providing the owner with notice or an opportunity to be heard where the unrebutted evidence establishes the complete and total absence of exigent circumstances?**

3. **Is the Due Process Clause of the Federal Constitution's Fourteenth Amendment further offended where the provisions of R.C. §3767.04 (B)(3) mandate the grant of a preliminary (or "temporary") injunction thereby increasing the length of time within which the deprivation of the property interest continues unchallenged, where the defendant requests additional time within which to prepare for the preliminary injunction hearing.**

The decision of the Court of Appeals sets a precedent that greatly diminishes the fundamental due process rights of all citizens of Ohio and gives the state and municipalities the unfettered right to take property without due process merely on the allegation that drug activity by third parties over whom the owner has no control has taken place on the property. It is undisputed that it is a fundamental right of all citizens that they be given notice and a fair hearing before the government may be permitted to take their property. In the case at bar, Cincinnati was permitted, without providing any notice whatsoever, to close and padlock the Elder Cafe. What's more, based on the application of R.C. 3763.04(B)(3), the state was able to maintain the closure for almost an entire year before Grogan was ever given any opportunity to challenge the merits of the state's nuisance claim. Such a result is

particularly egregious when one considers that, under the terms of the statute pursuant to which the state brought the nuisance action, the maximum penalty permitted to be imposed upon Grogan was the closure, for a period of one year, of his establishment. Thus, the state was able to inflict upon Grogan the maximum penalty permitted under the pertinent nuisance abatement statute before Grogan was allowed to answer the charges levied against him.

The first step taken by the state to close the Elder Cafe was a motion filed for an *ex parte* temporary restraining order pursuant to Rule 65 of the Ohio Rules of Civil Procedure. The trial court granted the *ex parte* temporary restraining order and denied Grogan and Nate's Cafe their fundamental right to due process of law solely on the allegation that illegal drug sales were occurring on the premises. (*Ex Parte* Temporary Restraining Order, Apx. F). In addition to granting the *ex parte* restraining order, the trial court failed to set a date within 14 days of the entry in which to have a hearing on Cincinnati and Ohio's motion for preliminary injunction, as required by Rule 65. To the contrary, the trial court did not hold a hearing of any kind for approximately 21 days later. After this period had elapsed, the court held a hearing on the issue of whether Grogan would be permitted to post a bond and re-open the café. During this time, the state continued to deny Grogan access to his property.

In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62, 114 S.Ct. 492, 505 (1993), This Court held that "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* This Court also noted, however that seizure of real property based on illegal drug activity, in and of itself, is not an extraordinary

circumstance justifying postponement of notice and hearing. *Id; see also State of Ohio, ex rel., Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 702 N.E.2d 81, 84 n-1 (1994). This Court noted that, while the drug forfeiture statute at issue was "a powerful instrument in the enforcement of the drug laws" the application of such statutes in *ex parte* proceedings "creates an unacceptable risk of error." *James Daniel Good Real Property*, 510 U.S. at 55. This Court has since reaffirmed the validity of this proposition in *Lujan v. G&G Fire Sprinklers, Inc.*, 121 S.Ct. 1446 (2001), wherein the Court reiterated that "the Government must afford the owner of a house subject to forfeiture as property used to commit or to facilitate commission of a federal drug offense notice and a hearing before seizing the property." *Id.*

The Court of Appeals for the First Appellate District of Ohio affirmed the trial court's *ex parte* temporary restraining order and stated that an "emergency situation" existed justifying the denial of Grogan and Nate's Cafe's right to due process of law. (Opinion and Judgment of Court of Appeals, Apx. B). The "emergency situation" according to the Court of Appeals centered around the fact (1) several drug offenses had occurred in and around the Café; (2) that the Café's neighbors has complained about the clientele that frequented the bar; and (3) based on the Elder Café's location in a high crime area, and the averments of the state, the provision of notice to Grogan would have endangered police officers.

Contrary to the Court of Appeals conclusions, the evidence demonstrates that, as a matter of law, no exigent circumstances existed. As has been noted, the existence of illegal drug activity does not constitute an exigent circumstance justifying the abandonment of Due Process principles. The police officers who carried out the closure of

the property testified that neither Grogan, the employees of the Elder Cafe, nor the patrons of the Elder Cafe were considered dangerous or a threat. (T.p. 535-536, 830-831, 943-944). The unrebutted testimony also established that Sergeant Hunt instructed the police officers who closed the Elder Cafe not to search Grogan, the Elder Cafe employees, or any of the patrons because they were not dangerous or a threat to the police. (T.p. 535-536, 943-944).[5] Furthermore, the police cannot create the exigent circumstance which justifies the denial of a party's constitutional right. *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984). This is precisely what the state attempted to do in the case at bar. The state attempted to create the exigent circumstance when they obtained and executed the temporary restraining order without notice or a hearing. If Cincinnati had not deprived Grogan of his fundamental constitutional rights, and had afforded him notice and hearing prior to closure, and the trial court had granted a padlocking order, then there would have been no threat to the police officers since Grogan and Nate's Cafe would have had notice of the closure. Instead, over 20 police officers descended upon Grogan and Nate's Cafe without notice and seized the property and, thus, created the alleged exigent circumstance. Given the lack of exigent circumstances, the state, as a matter of law, was not justified in denying Grogan his constitutional right to notice prior to the closure of his property. The intercession if this Court is necessary to remedy this injustice.

[5] The police did not conduct any "pat-downs" of Grogan, the employees or the patrons of the Elder Cafe. (T.p. 535-536). Pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 1881 (1968), a police officer may conduct a pat-down of a suspect if he reasonably believes the suspect is armed and dangerous or that the officer feared for his safety. *Id.* at 24, 88 S.Ct. at 1881; *State v. Bobo*, 37 Ohio St. 3d 177, 524 N.E.2d 489 (1988) (syllabus two). Because the police did not conduct a pat down of Grogan, the Elder Cafe employees or any of the patrons, they obviously did not reasonably believe any of these individuals were armed, dangerous or threatened their safety.

In its decision upholding the grant of the *ex parte* restraining order at issue, the Court of Appeals for the First District of Ohio stated that the United States Supreme Court "seems to recognize a difference between a prehearing civil forfeiture of real property and the issuance of an order like the *ex parte* TRO in this case." (Apx. B, p. 13a) In *James Daniel Good Real Property*, this Court stated that, to establish exigent circumstances, the government must demonstrate that less restrictive means would not suffice in protecting its interests in preventing the continued unlawful use of the real property at issue. *James Daniel Good Real Property*, 510 U.S at 55. The *James Daniel Good* Court then noted that such "less restrictive means" may include the issuance of a temporary restraining order. *Id.* The Court of Appeals, seizing on this language, upheld the propriety of the *ex parte* order in the present case on the basis that it was obtained under the rubric of Civ. R. 65 which permits an *ex parte* TRO to be issued in emergency circumstances and to survive "only long enough for a hearing." Thus, according to the Court of Appeals, the state was able to preserve its claimed interest through the "less restrictive means" of an *ex parte* TRO issued due to the existence of emergency circumstances. Such reasoning was fatally flawed.

The harsh reality ignored by the Court of Appeals is that, by virtue of the application of R.C. § 3767.04, the *ex parte* TRO issued in this case was not a "less restrictive means" for the protection of the state's claimed interest than a full-fledged forfeiture proceeding. This is because the *ex parte* TRO functioned to seize Grogan's property for over one year—a timeframe beyond the maximum period of deprivation allowed under the R.C. §3767.03, the applicable Ohio nuisance abatement statute. That is, while Ohio Civil Rule 65 provides that a TRO is to last only long enough for a hearing on the preliminary injunction, through mechanical application

of R.C. § 3767.04(B)(2), such hearing in this case never took place, and the hearing as to the permanent injunction did not take place until March 14, 2000, over one year after the Elder Café was first padlocked on February 26, 1999. The TRO thus acted, not as a "less restrictive means" to preserve the status quo, but instead destroyed the status quo, acting as a mechanism by which the state was permitted to seize Grogan's property without providing him either notice or a timely opportunity to be heard.

Ohio Revised Code § 3767.04 provides the procedure under which the state must proceed in attempting to obtain injunctive relief under R.C. § 3767.03, Ohio's nuisance abatement statute. Ohio Revised Code § 3767.04 provides the manner and timing by which a TRO may be sought.[6] For example, R.C. 3767.04(B)(1) states "[a]fter the filing of the complaint, an application for a temporary injunction may be filed with the court or a judge of the court. A hearing shall be held on the application within ten days after the filing." It is critical to note that such a hearing never took place. Grogan did appear before the court on March 18, 1999 pursuant to R.C. §3767.04(C) in an effort to file a bond to permit the re-opening of the Elder Cafe. As noted above, this bond was denied. Contrary to the characterizations of the Court of Appeals, however, this was not a preliminary injunction hearing the wherein Grogan was permitted an opportunity to challenge the validity of the TRO.[7] Upon denial of the bond, Grogan requested additional time within which to prepare a response to the complaint asserted against him by the state. The trial court, citing R.C. § 3767.04(B)(3) refused and

[6] The Ohio Courts have held that the state may circumvent the provisions of R.C. § 3767.04 relative to the issuance of a TRO, including the notice provisions provided therein, by using Civ. R. 65.

[7] It may be helpful to note that R.C. §3767.04 refers to a preliminary injunction as a "temporary injunction."

granted the preliminary injunction. A trial on the permanent injunction was not held until one full year later, in March of 2000.

Ohio Revise Code § 3767.04(B)(3) states in pertinent part:

> *(3) A copy of the complaint, a copy of the application for the temporary injunction, and a notice of time and place of the hearing on the application shall be served upon the defendant at least five days before the hearing.* ***If the hearing is the continued on the motion of any defendant, the requested temporary injunction shall be granted as a matter of course.***

(Emphasis added). Thus, if a defendant is not fully prepared to answer the claims brought against him within either ten days (the timeframe within which a preliminary injunction hearing is to take place under R.C. § 3767.04(B)(1)) or fourteen days (the timeframe within which Rule 65 requires the holding of a preliminary injunction hearing) R.C. § 3767.04(B)(3) requires that the court grant the preliminary injunction "as a matter of course." However, R.C. § 3767.04(B)(3) makes no provision for the timeframe within which a hearing/trial on a permanent injunction must take place. Thus, the defendant who requires additional time to repel the state's attempts to seize his property is forced into a position where his constitutional assurances of a meaningful opportunity to be heard are no longer secure.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976), this Court noted that "some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 902. This concept necessarily includes the

right to be heard at a meaningful time and in a meaningful manner. *Id.* The determination as to the adequacy of the process afforded by a given statutory or administrative procedures turns on an analysis of the following factors: (a) the private interest that will be affected by the actions of the state; (b) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (c) the government's interest, including a consideration of the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Id.* at 903.

Ohio Revised Code § 3767.04 provides the procedures to be accorded a defendant whose property the state seeks to take under the auspices that it constitutes a nuisance. In applying the *Mathews* factors, it becomes clear that the process afforded by R.C. § 3767.04 is constitutionally infirmed. First, as is the case with Grogan, the private interest affected by state action is one of great importance. In an action to abate a nuisance, the private property interest will invariably be either someone's home or, as is the case here, his business—the mechanism by which one earns a living and supports his family. Grogan and the Elder Cafe stand as testaments to the reality that, under the provisions of R.C. § 3767.04, the risk of the erroneous deprivation of one's property interest is unacceptably high. This statute provides the procedures the state must follow before it may seize and padlock one's home or business. However, under R.C. § 3767.04(B)(3), a defendant's opportunity to be heard is postponed indefinitely if he is not capable of defending himself against the state's claims within ten days. This provision permits the state, upon the mere allegation of drug activity, to achieve its goal of closure unopposed for an undetermined period of time. All the while, the property owner is excluded from his property, prevented from earning

a living and deprived of an opportunity to challenge the validity of the state's case against him.

What's more, the administrative burden on the state in providing additional safeguards would not adversely affect the state's interest nor be cost prohibitive. The state obviously has an interest in protecting the public, pursuant to its police powers, from violent and/or illegal behavior that creates or rises to the level of a public nuisance. Both this interest, and the interest of the property owner to be heard in a meaningful time and in a meaningful manner can be simultaneously protected. In order to meet the standard of constitutionality set forth in *Mathews*, Ohio Revised Code § 3767.04(B)(3) should provide the additional safeguard that, where a preliminary (or "temporary") injunction is issued "as a matter of course" based upon the defendant's request for a continuance, such defendant will have the opportunity to demand a hearing on a permanent injunction within a statutorily prescribed period of time (for example 60 days). Such a provision would protect all defendant property owners against (erroneous) deprivation that stretches, as it did in this case, beyond the maximum penal timeframe provided after a nuisance has been found to exist. Such a provision demands nothing new of the state, and imposes no burdens. The statute already requires that the state, within ten days (or fourteen if the TRO was sought pursuant to Civ. R. 65) be ready to demonstrate the necessity of a preliminary injunction. It is impossible to imagine how the state could claim injury where it is actually given more time to prepare its case.

The Ohio Court of Appeals for the First District of Ohio erred in concluding that the *ex parte* restraining order in the present case was a permissible. This Court should accept jurisdiction of issues outlined above in order to clearly articulate that, under the Federal Constitution, the property

owners of Ohio may not be subject to the seizure of their property absent the most basic due process of a timely hearing before such seizure may be accomplished.

VI. Conclusion

In the courts below, the concept of justice was abandoned and the Constitution misapplied. Under the reasoning provided by the lower courts, it is now alarmingly easy for the state to confiscate one's property under the auspices of abating a nuisance. All the government need do is single out an establishment that is open to the public, specifically one which is located in a poor, minority community where the nation's drug problem pervades. The state then need only selectively prosecute, from the massive body of drug offenses those occurring in the general community, those that occur on, or near, the premises and allege that such activity renders the premises a nuisance.

This result cannot be permitted to stand. Petitioner respectfully submits that this Court should accept jurisdiction over this case in order to reaffirm that, before a state may take a citizen's property, he must be given a timely opportunity to challenge the state's claims. This Court should then reaffirm the reality that due process mandates that, in order to successfully rebut the state's claims and forestall the forfeiture of his premises, a property owner must not be required shoulder a burden which is unduly oppressive and, by the state's own admission, impossible to meet.

Respectfully Submitted,

Harold G. Korbee
C.J. Schmidt
Attorney for Petitioners
Nate's Cafe and Jerome Grogan
Wood & Lamping, LLP
600 Vine Street
Suite 2500
Cincinnati, Ohio 45202
(513) 852-6000

APPENDIX A

SUPREME COURT OF OHIO

No. 01-820

July 25, 2001, Decided

Cincinnati ex rel. Cosgrove	)
	)
v.	)
	)
Grogan	)
	)

NOTICE:
DECISION WITHOUT PUBLISHED OPINION

On Appeal from the First Appellate District
Hamilton County
App. No. C-000221

JUDGES:
Moyer, C.J., Cook and Lundberg Stratton, JJ., dissent.

OPINION

DISMISSAL, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEAL, IF APPLICABLE, NOT ALLOWED.

Moyer, C.J., Cook and Lundberg Stratton, JJ., dissent.

APPENDIX B

COURT OF APPEALS OF OHIO
FIRST APPELLATE DISTRICT
HAMILTON COUNTY

APPEAL NO. C-000221
March 16, 2001, Filed

CITY OF CINCINNATI EX REL. CITY PROSECUTOR, TERRENCE COSGROVE, and STATE OF OHIO EX REL. ATTORNEY GENERAL, BETTY MONTGOMERY,
Relators-Appellees,

vs.

JEROME GROGAN and NATE'S CAFE, INC., aka ELDER CAFE,
Respondents-Appellants.

On Appeal From
Hamilton County Court of Common Pleas
TRIAL NO. A-9900996

JUDGES:

PAINTER, Judge, for the court on all but Grogan's Third Assignment. GORMAN, P.J., and WINKLER, J., concur. WINKLER, J., concurs. PAINTER, J., dissents.

OPINION BY: PAINTER; GORMAN

OPINION

In this case, we are asked to address primarily two issues: (1) whether an owner of a premises where felony drug offenses occur must actually participate in the drug offenses before the premises may be padlocked under the nuisance-abatement statutes, and (2) whether the nuisance-abatement statutes limit a closure to a one-year period. As explained below, we hold that an owner's actual participation is not necessarily a prerequisite to closure. We also conclude that if closure is ordered, the nuisance-abatement statutes limit the closure to a one-year period.

I. Procedural History

A. The Petition

Appellees, the state of Ohio and the city of Cincinnati, through relators Ohio Attorney General Betty D. Montgomery and Cincinnati Prosecutor Terrence R. Cosgrove, filed a civil complaint under R.C. Chapter 3767 to close the Elder Cafe, a bar located in the Findley Market area of the city. The complaint alleged that the Elder Cafe, owned by appellants Jerome Grogan and Nate's Cafe, Inc., had been used for felony drug violations and, thus, constituted a nuisance under R.C. 3719.10. (For convenience, we refer to appellees as "the City," to appellants as "Grogan," and to the establishment as "Elder Cafe.") The complaint sought, in part, a permanent injunction under R.C. 3767.06.

The City filed Cincinnati Police Sergeant Jeff Hunt's

affidavit, which contained complaints by neighbors and descriptions of illegal activities, arrests for misdemeanor and felony drug offenses that occurred from December 1998 through February 1999, and radio runs by police officers due to disturbances, all related to the Elder Cafe. Hunt stated that, in his professional opinion, notice of police entry into a building in which drug-related activity was suspected would create a risk of danger to the officers and would result in the destruction of evidence. His affidavit also referred to Grogan's tax documents, which were attached to the affidavit and reflected that Grogan was the president and statutory agent of Nate's Cafe, Inc. The attached deed indicated that Nate's Cafe, Inc., was the owner of the Elder Cafe.

B. The Ex Parte Temporary Restraining Order

The City's attorneys filed a Civ.R. 65 certification, moved for an *ex parte* temporary restraining order, and also applied for a preliminary injunction seeking, in part, the closure of the Elder Cafe. (Although neither the trial court nor the parties were consistent in using the correct name, the nuisance-abatement statutes label what is ordinarily referred to as a "preliminary injunction" as a "temporary injunction.") The attorney certification reflected that illegal drug trafficking had taken place at the Elder Cafe over the past two years, that the drug trafficking had caused immediate and irreparable harm to the community, that the citizens of Ohio would suffer immediate and irreparable harm with no remedy at law if the order were not granted *ex parte*, and that exigent circumstances existed. The exigent circumstances included the following: danger to the lives of the police officers; destruction, removal, or concealment of evidence, contraband, and illegal narcotics; irreparable harm due to

further illegal drug sales made in anticipation of subsequent police raids and closure; and illegal drug sales made as a result of delay. The certification also noted that Grogan's property rights would be protected by notice of the hearing on the application for a "preliminary" injunction, which was to be heard within ten days of the issuance of the temporary restraining order.[1]

The trial court granted the *ex parte* temporary restraining order ("TRO") and permitted the Elder Cafe to be closed and padlocked, as deemed necessary by the Cincinnati Police Department, to prevent its use for any purpose until a decision was made on the "preliminary" and permanent injunction. The next day, the Cincinnati police entered the premises, made an inventory of the bar, and boarded and padlocked the building. That same day, Grogan was served with the complaint and supporting affidavit, the *ex parte* TRO and supporting motion, the application for a "preliminary" injunction, and the Civ.R. 65 certification. The parties agreed to a continuance for the temporary-injunction hearing.

Meanwhile, Grogan moved to dissolve the TRO and to strike Hunt's affidavit. He supported his motion with his own affidavit. He also requested a bond so that the business could continue operations under R.C. 3767.04(C).

The trial court (1) granted the City's application for a "preliminary injunction," as mandated by R.C. 3767.04(B)(3), when Grogan requested a continuance, (2) denied Grogan's request to remain in operation pursuant to

---

[1] *See* R.C. 3767.04(B)(1).

R.C. 3767.04(C), and (3) set a hearing on the City's application for a permanent injunction. It dismissed, as moot, Grogan's motion to dissolve the TRO. On March 1, 1999, the parties agreed to have the temporary-injunction hearing held on March 9, 1999, one day later than originally scheduled. (The entry was apparently signed by Grogan's counsel on behalf of the City by telephone authorization on February 26, 1999.) Without objection from Grogan as to the length of any delay, a determination on the temporary injunction was made on March 18, 1999. Thus, the Elder Cafe was padlocked from February 26, 1999, through March 18, 1999, (twenty-one days) under the *ex parte* TRO.

C. Grogan's Counterclaims

Grogan counterclaimed against the City, alleging that the City had violated Grogan's civil rights under Section 1983, Title 42, U.S.Code, his state constitutional rights to due process and equal protection, and his state and federal statutory rights to privacy. The parties submitted several motions, including motions for summary judgment. The trial court granted summary judgment in favor of the City on Grogan's counterclaims and denied all other motions, including Grogan's motion for a jury trial on the nuisance claim.

D. The Permanent Injunction

Almost one year from the date the City had filed its complaint, the trial court heard the City's application for a permanent injunction. After a two-week trial, the court granted the injunction and ordered the Elder Cafe to be padlocked for one year, beginning March 14, 2000.

II. Grogan's Appeal

In his appeal, Grogan raises five assignments of error. He claims that the trial court erred by (1) granting the City an *ex parte* TRO; (2) granting the City discretion to padlock the Elder Cafe; (3) granting the City summary judgment on his counterclaims; (4) denying his request for a jury trial; and (5) padlocking the Elder Cafe for two years.

A. The Ex Parte Temporary Restraining Order

In his first assignment, Grogan argues that the trial court erred by granting the *ex parte* TRO that allowed the City to padlock Elder Cafe. Specifically Grogan makes two arguments: (1) that there were no exigent circumstances to justify the denial of his due-process rights to proper notice and an opportunity to be heard, and (2) that this issue was not waived.

The City moved for an *ex parte* TRO based on exigent circumstances. The lack of notice, according to the City's Civ.R. 65 attorney certification, was necessary to prevent danger to the police officers who would be involved in the closure, destruction of contraband and the removal or destruction of personal property, and irreparable harm due to illegal drug sales that would be conducted in anticipation of the police raid and facilitated by any delay in the closure of the premises. Because the *ex parte* order was preempted by the "preliminary" or temporary injunction, and Grogan has not demonstrated any prejudice, we question whether there is

any basis to invalidate the TRO.[2]

But even before we get to the merits of Grogan's argument, we must express concern about the City's use of Civ.R.65 to contravene the plain language of the abatement statutes. R.C. 3767.04(B)(2) allows a trial court to issue an *ex parte* TRO *if* an application for a temporary injunction is filed. (A hearing on an application for a temporary injunction must occur within ten days after the filing of the application.[3]) The *ex parte* TRO under the statute limits the trial court's authority to "restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where the nuisance is alleged to exist until the decision of the court or judge granting or refusing the requested temporary injunction and until further order of the court."

Five days before the hearing on an application for a temporary injunction, the defendant must be served with a copy of the abatement complaint, the application for the temporary injunction, and notice of the time and place of the hearing.[4] If the defendant requests a continuance of the hearing, the temporary injunction must be granted as a matter of course.[5] If the hearing is had and the court is satisfied that

---

[2] Accord *State ex rel. Eckstein v. Video Express* (1997), 119 Ohio App. 3d 261, 271, 695 N.E.2d 38, 45.

[3] *See* R.C. 3767.04(B)(1); *State ex rel. Pizza v. Rayford* (1992), 62 Ohio St. 3d 382, 582 N.E.2d 992, fn.2.

[4] *See* R.C. 3767.04(B)(3).

[5] *See id.*

the allegations in the complaint have been sustained, the court must enter a temporary injunction. The statute allows the trial court to issue a closure order *at the time it grants the temporary injunction if it appears that the defendant has received five days' notice* of the hearing and has not demonstrated to the satisfaction of the court that the nuisance has been abated.[6]

A closure order issued under a temporary injunction is effective until a "final decision is rendered on the complaint for the requested permanent injunction."[7] The closure order shall also continue in effect any restraining order already issued under *R.C. 3767.04(B)(2)* until a decision is made on the permanent injunction. If a restraining order has not been issued, the closure order must also restrain "the removal or interference with the personal property and contents located in the place" until a decision is made on the permanent injunction.[8]

The owner "of any real or personal property closed or restrained or to be closed or restrained" may appear before the court any time between the filing of the complaint for a permanent injunction and the hearing on the complaint, and may be allowed to file a bond. If the owner convinces the trial court that the nuisance will be abated, the trial court may "discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order

---

[6] *See id.*

[7] *See id.*

[8] *See id.*

closing the real property or restraining the removal or interference with the personal property."[9] R.C. 3767.06(A) allows for the continuation for one year of "any closing order issued at the time of the granting of the temporary injunction." If a closing order is not granted when the temporary injunction is issued, the abatement order must include a one-year closing.[10]

The language of the statutes clearly contemplates that closure is to occur only where the defendant has had five days' notice of the temporary-injunction hearing, and where the defendant has failed to show abatement of the nuisance. Further, under the statute, an *ex parte* TRO may only keep a "defendant and all other persons" from removing personal property and contents from the place the nuisance is alleged to be occurring. The language of R.C. 3767.06(A) regarding the timing of the closure order supports this reading of the statute.

In spite of the clear limitation the abatement statutes place on an *ex parte* TRO, courts, including the Ohio Supreme Court, have allowed complainants to circumvent the limitation by using Civ.R. 65.[11] In *State ex rel. Pizza v. Rayford,* the state moved for a temporary restraining order and a temporary injunction under R.C. 3767.04 and Civ.R.

---

[9] *See* R.C. 3767.04(C)

[10] *See* R.C. 3767.06(A).

[11] *See State v. Ramey,* 1999 Ohio App. LEXIS 4063 (Sept. 3, 1999), Clark App. No. 99CA0002, unreported; State ex rel. Pizza v. Rayford, supra.

65, and sought to have the premises padlocked until the trial court took further action on the state's nuisance complaint. The trial court granted the *ex parte* TRO and ordered the premises padlocked pending a decision on the temporary injunction and a permanent injunction. After the hearing on the temporary injunction, the court ordered the premises closed and padlocked pending a decision on the complaint.

The issue raised in *State ex rel. Pizza v. Rayford* was whether the failure to hold a preliminary-injunction hearing within ten days in contravention of R.C. 3767.04 was reversible error. The supreme court determined that it was not. R.C. 3767.04 requires a trial court to hold a hearing "within ten days after the filing" of the preliminary-injunction application. The state argued that Civ.R. 65, not the statute, was controlling. Under Civ.R. 65, the expiration of the temporary restraining order was when the court was required to, and did, hold a hearing.

The supreme court recognized that a temporary injunction and an *ex parte* TRO are "two entirely independent forms of relief."[12] It also recognized that "the statute suggests that an application for a [temporary injunction] is a prerequisite to the issuance of an *ex parte* TRO preventing interference with the property alleged to be a nuisance** * *."[13] In spite of that, the supreme court also stated that "the [trial] court properly granted the state's request for a TRO that resulted in the closing and padlocking of the property in

---

[12] *See State ex rel. Pizza v. Rayford* at 384, 582 N.E.2d at 994.

[13] *See id.*

question, to preclude appellee and others from interfering with the property until the [temporary] injunction hearing." [14]

Based on *State ex rel. Pizza v. Rayford* and in spite of the language of *R.C. 3767.04*, an *ex parte* TRO is available under Civ.R. 65 to padlock property alleged to be a nuisance.

In *State ex rel. Pizza v. Rezcallah,*[15] however, the Ohio Supreme Court indicated that any prehearing padlocking of property requires a showing of "exigent" circumstances. It also acknowledged that the seizure of real property based solely on the fact that illegal drug activity has occurred in a residence may not comport with the Due Process Clause of the United States Constitution.[16] It relied on *United States v. James Daniel Good Real Property*[17] to support its pronouncement. But the United States Supreme Court seems to recognize a difference between a prehearing civil forfeiture of real property and the issuance of an order like the *ex parte* TRO in this case. In fact, the Supreme Court has concluded that, to demonstrate "exigent" circumstances, the federal government must show that less restrictive means to protect its interests under the federal civil-forfeiture statute would be insufficient. Such less restrictive measures include the filing

---

[14] *See State ex rel Pizza v. Rayford* at 385, 582 N.E.2d at 995.

[15] *See State ex rel. Pizza v. Rezcallah,* (1998), 84 Ohio St. 3d 116, 117, 702 N.E.2d 81, 84, fn. 1.

[16] *See id.*

[17] *See United States v. James Daniel Good Real Property,* (1993), 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490.

of a notice of *lis pendens* to prevent the sale of the real property or the issuance of an *ex parte* restraining order to prevent destruction of the property.[18] The Court has also distinguished between the forfeiture of real property that cannot be removed or concealed and the forfeiture of property that can be destroyed, concealed, or removed if advance warning is provided.[19]

In this case, the City obtained an *ex parte* TRO under Civ.R. 65. Civ.R. 65 allows TROs to be "issued *ex parte* without notice in an emergency situation 'to last only long enough for a hearing.'"[20] Under the facts of this case, the trial court granted the *ex parte* TRO based upon averments that notice to the Elder Cafe would place police officers in danger and would result in the removal of personal property and the destruction of contraband. The Elder Cafe was located in a high-crime area. Its neighbors had complained about the unruly conduct of the clientele frequenting the bar, and an unsolved homicide had occurred inside the bar in the recent past. Several drug offenses also had taken place in and around the bar. We conclude, solely for the purposes of this case, that the City demonstrated the requisite emergency circumstances. Because of our disposition of Grogan's first argument, we need not address whether the lack-of-exigent-circumstances issue was waived in the court below.

---

[18] *See United States v. James Daniel Good Real Property* at 58, 114 S. Ct. at 502.

[19] *See United States v. James Daniel Good Real Property*, 510 U.S. at 52, 114 S. Ct. at 500.

[20] *See Bexley v. Duckworth*, 2000 Ohio App. LEXIS 817 (Mar. 7, 2000), Franklin App. No. 99AP-414, unreported.

B. Participation in Felony Drug Offenses Is Not Necessary for Abatement

In Grogan's second assignment, he argues that the trial court erred when it granted the City discretion to padlock the property because the City had failed (1) to prove that Grogan had participated in any felony drug offenses, (2) to prove that he had any knowledge of the alleged felony drug transactions and that he had acquiesced to them, and (3) to respond to his requests for admissions in a timely manner.

The City alleged that the Elder Cafe constituted a nuisance under R.C. 3719.10, which states that "premises or real estate * * *,on which a felony violation of Chapter 2925 * * * of the Revised Code occurs constitutes a nuisance subject to abatement pursuant to Chapter 3767. of the Revised Code." R.C. Chapter 3767 sets forth the procedures to abate and enjoin a nuisance.

To establish that a nuisance exists, R.C. 3719.10 requires the state to prove by clear and convincing evidence "that felony violations of R.C. Chapter 2925 chronically occur on a parcel of property."[21] R.C. 3767.02 "does not require proof of acquiescence to or participation in the creation or perpetuation of a nuisance in order to find an owner of a nuisance guilty of the civil offense of maintaining a nuisance."[22] But "proof of an owner's knowledge,

---

[21] *See State ex rel. Miller v. Anthony (1995)*, 72 Ohio St. 3d 132, 140, 647 N.E.2d 1368, 1374.

[22] *See State ex rel. Pizza v. Rezcallah* 84 Ohio St. 3d 116, 702 N.E.2d at 83, paragraph one of the syllabus.

acquiescence, or participation is relevant * * * in determining which statutory remedies may be imposed once the owner is found guilty of maintaining a nuisance."[23]

According to Grogan, the holding of State ex rel. Pizza v. Rezcallah[24] required the City to prove that he had participated in the felony drug offenses themselves before the bar could be closed under the abatement statutes. Grogan relies on the fact that the second syllabus paragraph of *Rezcallah* uses the conjunction "and" when referring to participation:

To the extent that R.C. 3767.06(A) requires a trial court, upon a finding of a nuisance, to issue an injunction closing property against its use for any purpose for one year, and to the extent that it allows release from such injunction only through the filing or renewal of a bond in the full value of the property, the statute violates the Fourteenth Amendment Due Process Clause and the Fifth Amendment Takings Clause of the United States Constitution, and Section 19, Article I of the Ohio Constitution, when applied to an owner who did not negligently or knowingly acquiesce to, and did not participate in the creation or perpetuation of the nuisance.

---

[23] *See id.* at 122, 702 N.E.2d at 87.

[24] *State ex rel. Pizza v. Rezcallah, supra.*

We understand the difficulty of deciphering this 113-word sentence. But the syllabus is the law,[25] so we must attempt to translate it.

Rezcallah involved three separate defendants whose property had been padlocked under R.C. Chapter 3767. One of the defendants was a landlord whose tenant was selling drugs from her property. Another of the defendants was a property owner who had invited a guest into his home. The guest would not leave and sold drugs from the house. The owner filed charges against the unwanted guest and finally abandoned the house to the guest. The third defendant owned a residence, occupied by her brother, who orchestrated drug sales from the house. It was undisputed in all the cases that the owners neither acquiesced nor participated in the drug transactions, and that all three took affirmative action to investigate drug allegations and to remove the dealers after discovering that drugs were being sold from their property.

The court first answered the question of what must be demonstrated to show a nuisance under *R.C. 3767.02.* It held in the first syllabus and stated in the text that " R.C. 3767.02 does not require a finding of acquiescence to *or* participation in the creation or perpetuation of a nuisance on the owner's property in order to find an owner guilty of maintaining a nuisance."[26] This holding allows a court to find that an innocent owner has maintained a nuisance.

---

[25] *See* S. Ct. R.Rep.Op. 1(B); *Cassidy v. Glossip* (1967), 12 Ohio St. 2d 17, 231 N.E.2d 64, paragraph six of the syllabus.

[26] *See State ex rel. Pizza v. Rezcallah* at 120, 702 N.E.2d at 86 (emphasis added).

The court concluded in the body of its decision that "to the extent that R.C. 3767.06(A) mandates the imposition of a closure order directing the effectual closing of the place where a nuisance is found to exist against its use for any purpose for a period of one year, or requires the filing or renewal of a bond in lieu of such closure order, *when the owner of the property bears no culpable responsibility in the nature of the acquiescence to or participation in the creation or perpetuation of the nuisance, the statute violates the Fourteenth Amendment Due Process Clause and the Fifth Amendment Takings Clause of the United States Constitution, and Section 19, Article I of the Ohio Constitution.*"[27] The court further concluded, "We hold * * * that the mandatory closure provisions of R.C. 3767.06(A) do not substantially advance [the prevention of illegal drug activity] when imposed against property owners who have not acquiesced to *or* participated in the illegal activity, and who have promptly abated the nuisance upon its discovery."[28] It also stated that "if, despite, a finding of guilt, the court determines that a defendant owner acted in good faith, was innocent of any acquiescence to *or* participation in the conduct establishing the nuisance, and took prompt action to abate the nuisance, no closure order shall be issued under R.C. 3767.06(A) and no tax shall be imposed pursuant to R.C. 3767.09."[29]

The Ohio Supreme Court's holding in *Rezcallah*

---

[27] *See id.* at 124, 702 N.E.2d at 88 (emphasis added).

[28] *See id.* at 129, 702 N.E.2d at 92 (emphasis added).

[29] *See id.* at 132, 702 N.E.2d at 94 (emphasis added).

clearly seeks to protect an innocent property owner from having his or her property forfeited. The syllabus language thus defines, for purposes of the constitutionality of a one-year closure, what constitutes an innocent property owner. An innocent property owner is one who "[has] not negligently or knowingly acquiesced to, and [has] not participated in the creation or perpetuation of the nuisance."

Obviously, if a property owner either acquiesced in the felony drug offenses or participated in the creation or perpetuation of them, the owner would not be innocent. The syllabus does not require a petitioner to establish negligent or knowing acquiescence *and* participation before closure may occur. Either acquiescence or participation takes an owner out of the innocent category. If both acquiescence and participation were required to be proven, an owner who sold drugs on his property, but who did not acquiesce to others selling drugs, would be free from an order of closure. Just as we may not interpret statutes to reach an absurd result, we will not interpret a supreme court syllabus to reach an absurd, and unintended, result.

The *Rezcallah* syllabus compounds the ambiguity by using "and" where "or" would have better conveyed the meaning intended. The body of the decision uses "or" in every reference to the same proposition. Surely, we may use the body of the supreme court opinion to interpret the syllabus, when the syllabus may permit two interpretations.

Our interpretation is the most reasonable way to reconcile the language in the body of the text with the syllabus language. To be an innocent owner who is afforded constitutional protection against closure, the owner may

neither acquiesce to felony drug offenses occurring on his property nor participate in creating or perpetuating the drug dealing. If the owner does either of these, the owner is not an innocent owner.[30]

C. Competent, Credible Evidence of Acquiescence

Grogan argues that the record fails to demonstrate that he acquiesced to the felony drug offenses. He argues that he had no knowledge of the felony drug arrests that the City proved, because the police had never informed him of the drug arrests and because the arrests had taken place outside his establishment. He also presented evidence that his bar was a nice, quiet place, and that his employees did not know that drug transactions occurred in the bar. He also argues that the state's witnesses were not credible based on their prior testimony.

Grogan testified that he was frequently on the premises, but spent the majority of the time in his second-floor office. He testified that he had attempted to abate the nuisance by installing a camera (that was infrequently monitored) and a mirror, placing signs around the bar, and refusing to serve certain undesirable people.

The state presented evidence that Grogan paid his employees, whom he expected to monitor drug activities, less

---

[30] Accord *State ex rel. Freeman v. Pierce* (1991), 61 Ohio App. 3d 663, 671, 573 N.E.2d 747, 752, fn. 2 ("[Acquiescence and participation] are most often used in a mutually exclusive sense, in that one requires a failure to object or to protest, and the other a positive act.")

than minimum wage; that one of his bartenders was a drug user; and that Grogan was present on the premises for only short periods of time during the morning hours.

The state also presented evidence that several felony arrests had occurred as the result of drug violations that took place in the Elder Cafe during a thirty-eight-day period. The state also presented evidence that the smell of marijuana was pervasive and that drug transactions appeared to be constantly occurring in the entranceway of the Elder Cafe. Police officers testified that they had conducted drug sweeps in the bar, had confiscated marijuana, cocaine, and heroin, and had observed ground-out marijuana butts on the floor and tables of the bar, and further stated that they had spoken to Grogan's employees about the narcotics problem in the bar getting out of hand. Neighbors testified that suspicious drug activity took place right outside the bar.

Further, Grogan was informed, at a July 1998 public hearing conducted before the Ohio Department of Liquor Control, that drugs had been recovered from and sold at the Elder Cafe. (The hearing resulted from the Cincinnati City Council objecting to the renewal of Grogan's liquor permit. The hearing examiner denied the renewal in September of 1998. Grogan appealed, and the denial of the renewal of the liquor permit was affirmed. It is not clear from the record whether a stay was obtained to permit the operation of the Elder Cafe as a bar. Grogan's deposition indicates that the Elder Cafe apparently was operating as a bar until at least October of 1999.) Grogan also had in his possession the order from that hearing, which indicated that drug dealers were seen coming in and out of the bar on a regular basis, and that witnesses had testified to seeing marijuana and cocaine sales

inside and immediately outside the bar. Grogan testified that, after the Liquor Control Board hearing, he was aware of the allegations of drug dealing and that drugs had been recovered from the Elder Cafe, but that he did not believe the allegations.

D. Burden of Proof

To obtain a nuisance-abatement order, the relator must prove its allegations by clear and convincing evidence.[31] In this case, the City had the burden to prove by clear and convincing evidence that "chronic felony violations" of R.C. Chapter 3719 had occurred on the premises and that Grogan "knew of the drug offenses, and either participated in them, or acquiesced in their occurrence."[32] To meet its burden of proving knowledge and acquiescence to or participation in the drug offenses, the City could offer direct evidence, evidence of the general reputation of the Elder Cafe, and "an admission by or a finding of guilt of any person under the criminal laws [of felony-drug offenses] at the site of the alleged nuisance."[33] The means of proof, other than by direct evidence, would "create a rebuttable presumption of knowledge and acquiescence or participation under R.C. 3767.05."[34]

---

[31] *See State ex rel Freeman v. Pierce* at 669, 573 N.E.2d at 752.

[32] *See id.* at 670, 573 N.E.2d at 752.

[33] *See State ex rel. Pizza v. Carter* (C.P.1993), 63 Ohio Misc. 2d 235, 239, 622 N.E.2d 1194, 1198.

[34] *See id.*

The City presented clear and convincing proof of the general reputation of the Elder Cafe and of convictions for felony drug offenses that had occurred at the Elder Cafe. This created a rebuttable presumption of acquiescence. Grogan presented evidence contrary to the City's evidence. Thus, Grogan's challenge on appeal goes to the weight of the evidence supporting the trial court's judgment.

E. Weight of the Evidence

The standard of review for manifest-weight issues in civil cases is that "judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."[35] Further, we must presume that the findings of the trial court are correct based on the rationale that "the trial [court] is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."[36]

Because there is competent, credible evidence from which the trial court could have inferred in this case that Grogan had acquiesced to felony drug offenses by "burying his head in the sand," we find no merit in his manifest-weight challenge. Further, were we to review the evidence under the

---

[35] *See C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St. 2d 279, 376 N.E.2d 578, paragraph one of the syllabus.

[36] *See Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273, 1276.

standard set forth in *State v. Thompkins* (1996), 75 Ohio St. 3d 558, 664 N.E.2d 926, we would still come to the same conclusion, because the trial court did not lose its way and create a manifest miscarriage of justice in concluding that Grogan had acquiesced to the drug offenses.

F. Request to Admit

In his third argument under this assignment, Grogan contends that the trial court abused its discretion by refusing to deem as an admitted fact the following statement appearing in his requests for admissions: "Relators did not inform Grogan of any felony arrests at the Elder Cafe between December 30, 1998, and February 25, 1999." The state of Ohio did not respond to the request and the City responded late. At a hearing, the City argued that its late response also pertained to the state of Ohio because both were jointly prosecuting the case. The trial court refused to find that the City had admitted that Grogan had not been informed of any felony arrests between December of 1998 and February of 1999. It stated that the City had argued from the beginning that Grogan had notice of "the events." It did not find that the state had admitted the fact, because it would not make any sense to admit the fact against the state, but not against the City.

Civ.R. 36(B) allows a court to permit withdrawal of an admission "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that the withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." (Civ.R. 36 did not require the City to file a written motion for withdrawal, nor did it explicitly

require that a motion be made at a particular time.[37]) A trial court thus has the discretion under Civ.R. 36(B) to act "to serve what [it] believes to be the best interests of justice."[38] Because the rule allows the trial court discretion to permit an amendment or a withdrawal of an admission, we may only reverse such a decision when the trial court has abused that discretion.[39]

In this case, the court obviously recognized that the presentation of the merits would be enhanced when it determined that Grogan's "knowledge" had been contested from the beginning, and that to admit the fact against the state but not the city would be senseless. Further, Grogan failed to produce any evidence to show that he would have been prejudiced in maintaining his defense. The fact that Grogan allegedly did not know of the felony arrests did not demonstrate, under the standard of R.C. 3719.10, that he did not know that felony drug violations had occurred on the premises.[40] (Further, there was no dispute at trial that Grogan had not been informed of the arrests.) Thus, we conclude that

---

[37] *See Balson v. Dodds* (1980), 62 Ohio St. 2d 287, 290, 405 N.E.2d 293, 296, fn. 2.

[38] *See Nursing Staff of Cincinnati, Inc. v. Sherman* (1984), 13 Ohio App. 3d 328, 330, 469 N.E.2d 1031, 1033-1034.

[39] Accord *Amer, Cunningham, Brennan Co., L.P.A. v. Sheeler*, 1999 Ohio App. LEXIS 1995 (Apr. 28, 1999), Summit App. No. 19093, unreported; *Tabor v. Westfield Cos.*, 1998 Ohio App. LEXIS 891 (Feb. 27, 1998), Gallia App. No. 97CA05, unreported.

[40] *See State ex rel. Freeman v. Pierce*, 61 Ohio App. 3d at 668-669, 573 N.E.2d at 751.

the trial court did not abuse its discretion in refusing to recognize as an admission the statement contained in Grogan's request.

G. Insufficient Steps to Abate

In his fourth issue, Grogan argues that because he had taken steps to control illegal drug activity at the Elder Cafe, he could not have acquiesced to the activity. The trial court recognized that Grogan had taken some steps to eliminate the problem, but determined that the steps were inadequate, insufficient and "minimal." It concluded that Grogan had not made "an honest or reasonable effort to abate" the nuisance. The evidence demonstrated that Grogan had fired the "floor walker" to make a point to other employees; that he had installed a camera in the pool room; that he had changed the glass in the front door; and that he had increased the time he spent at the bar. He had also reminded his employees that drug transactions were prohibited and posted a sign forbidding disorderly conduct.

The trial court determined that the video camera was only monitored periodically, and that little was taped. It referred to Grogan as an absentee landlord who "might as well not have been there for all the usefulness that he was to this operation. He did not get in the bar, serve the drinks, or watch the customers and so forth." The trial court also found that the salary that Grogan paid his employees, who were from the same neighborhood as the patrons, did not provide "any great incentive to them to stand up to drug dealers or anybody else or even to look for drug dealers." According to the trial court, the evidence demonstrated that Grogan would not talk to police, did not ask for advice, and did not believe

that there was a problem on the premises.

Grogan's argument is another challenge to the weight of the evidence. Because there is competent, credible evidence to support the trial court's conclusions, we will not reverse its judgment. We overrule Grogan's second assignment.

III. Counterclaims

A. Section 1983, Title 42, U.S.Code

In Grogan's third assignment, he contends that the trial court erred by granting summary judgment in the City's favor on his counterclaims. He argues that the padlocking of the Elder Cafe under the *ex parte* TRO gave rise to a claim under Section 1983, Title 42, U.S.Code, because the padlocking violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. He also argues that the padlocking was a taking of property in violation of Section 19, Article I of the Ohio Constitution. Grogan supports these claims with the arguments that *State ex rel. Pizza v. Rezcallah* required a showing that that he had participated in the drug felonies, and that the *ex parte* TRO could not be validly based on drug activities.

Although the trial court based its ruling on the fact that the City was not the moving force behind the TRO, we believe that summary judgment was appropriate because there was no genuine issue of material fact and the City was entitled to judgment as a matter of law. As discussed in prior sections of this opinion, Grogan's legal arguments have no merit. Violations of due process and takings of property without

justification do not occur where an *ex parte* TRO is supported by exigent circumstances, and where the law does not require a property owner to participate in felony drug transactions before its property may be closed.

Grogan also argues that the trial court granted the City discretion on whether to close the Elder Cafe. But, as the trial court pointed out in its entry, any discretion was limited to the means for effectuating the closure--boarding up the building or padlocking it. This "discretion" did not give rise to a constitutional violation.

B. Jury Trial

In his fourth assignment, Grogan challenges what he views as the trial court's denial of his right to a jury trial on the issue of whether he was an innocent owner. The Ohio Supreme Court has held that there is no right to a jury trial in a nuisance-abatement action.[41] In its view, "The confiscation and sale of personal property used in maintaining a nuisance and the imposition of a one-year closing order pursuant to R.C. 3767.06 as well as the imposition of the tax required by R.C. 3767.08 are preventative measures, not penalties imposed for past criminal conduct. Inclusion of these provisions within the nuisance abatement framework does not transform nuisance abatement actions into legal actions to which the right to a jury trial attaches."[42]

---

[41] *See State ex rel. Miller v. Anthony*, paragraph one of the syllabus.

[42] *Id.* at paragraph two of the syllabus.

IV. Closure Duration

In his fifth assignment, Grogan argues that the trial court erred by imposing a two-year closure on the Elder Cafe. The court ordered that the closing was to extend for one year from the date of its determination on the permanent injunction. The practical effect of the order was that the Elder Cafe would be padlocked for two years. Grogan argues that the padlocking could only be limited to a one-year period under R.C. 3767.06. We agree.

R.C. 3767.04(B)(3) allows for a temporary closure order, but the order "is limited to the prevention of prohibited activity and does not authorize the court to order an 'effectual closing * * * against its use for any purpose' (R.C. 3767.06[A]) via padlocking or otherwise."[43] A temporary closure order may be discharged "if the owner posts a bond for the full value of the property and fulfills the other requirements listed in R.C. 3767.04(C)."[44] The Ohio Supreme Court in *Rezecallah* explained that if the existence of a nuisance is established in a civil action, "the court 'shall' enter judgment that 'perpetually enjoins the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining the nuisance elsewhere.' R.C. 3767.05(D). R.C. 3767.06(A) also requires that an 'order of abatement shall be included in the judgment entry.' Because both R.C. 3767.05(D) and 3767.06(A) use the imperative word 'shall,' these provisions

---

[43] *See State ex rel. Pizza v. Rezcallah* at 121, 702 N.E.2d at 86.

[44] *See id.*

are deemed mandatory."

The abatement statute, according to *Rezcallah*, mandates that "where the owner has not provided a bond prior to the trial on the merits, and where no prior closure order was issued against the use of the property, the order 'shall' direct closure of the real property against use for any purpose for one year."[45] If no bond was furnished, and a closing order was issued at the time of the granting of the temporary injunction, that order "shall continue for one year."[46] (In this case, the trial court denied Grogan's request for a bond and granted the temporary injunction.) *Rezcallah* makes clear that the "padlocking [of] an owner's property, effectively closing it against all uses"[47] is limited to one year. The trial court here initially closed the Elder Cafe under a Civ.R. 65 *ex parte* TRO on February 26, 1999. The law mandates, under these facts, that the court's abatement order "shall continue for one year any closing order issued at the time of granting the temporary injunction." Thus, where the *ex parte* TRO was substituted for the temporary injunction under the nuisance-abatement statutes, the Elder Cafe could be closed for all purposes only until February 26, 2000. Thus, we sustain Grogan's last assignment of error.

---

[45] *See id.* at 122, 702 N.E.2d at 87.

[46] *See* R.C. 3767.06(A).

[47] *See State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d at 124-125, 702 N.E.2d at 89.

V. Conclusion

We affirm the trial court's judgment except to the extent that it orders the closing of the Elder Cafe for two years. We reverse that part of the trial court's judgment and remand this case for the dissolution of the padlocking order and the immediate return of the property to Grogan.

Judgement affirmed in part and reversed in part, and cause remanded.

GORMAN, P.J., and **WINKLER, J.**, concur.

GORMAN, Presiding Judge, for the court on Grogan's Third Assignment.

Counterclaim Concerning Tax Returns

Grogan challenges the summary judgment granted by the trial court in favor of the City on his counterclaim alleging that the City had disclosed his city tax returns with his attached federal income tax returns in violation of the confidentiality afforded by Section 6103, Title 26, U.S.Code. We disagree.

The City attached to its petition for the ex parte TRO Sergeant Hunt's affidavit, which states, "The tax documents on file with the City of Cincinnati Tax Department reflect Jerome Grogan's signature as President of Nate's Cafe." Also attached to Sergeant Hunt's affidavit were 1995 through 1997 city income-tax returns with corresponding federal income tax returns for those same years, filed in the name of Nate's Cafe, Inc., and signed by Grogan either as president or as the

"tax matters person for the S corporation."

Grogan vaguely cast his counterclaim against the City in terms of a violation of his right of privacy. The pleading requirements and the merits of the privacy claim have not been addressed by either party. Nothing suggests that the release of Grogan's tax returns was prompted by a City policy, a predicate for a valid civil-rights claim under Section 1983, Title 42, U.S.Code. Furthermore, because of the public's legitimate concern about nuisance abatement, any intrusion into Grogan's privacy resulting from the exercise of the City's police power was not wrongful under the elements of an actionable claim for invasion of the common law right of privacy. *See Housh v. Peth (1956)*, 165 Ohio St. 35, 133 N.E.2d 340, paragraphs one and two of the syllabus; *see, also, Strutner v. Dispatch Printing Co.* (1982), Ohio App. 129, 2 Ohio App. 3d 377, 442 N.E.2d 129. And even if Grogan's claim was well-pleaded, a city employee, who negligently discloses confidential information acts in connection with a governmental function. Both the employee and the political subdivision are, as a matter of law, immune from liability for damages pursuant to R.C. 2744.02(A)(1). *See Conley v. Shearer* (1992), 64 Ohio St. 3d 284, 292, 595 N.E.2d 862, 869. To remand this issue to the trial court for further consideration would simply be an exercise in futility.

More important, however, is that disclosure of Grogan's tax returns was authorized under Section 6103(p)(8), Title 26, U.S.Code. Under the definition in Section 6103(b)(5)(B)(i), "The term 'State' means - for purposes of subsection * * * (p) any municipality--with a population in excess of 250,000 (as determined under the most recent decennial United States census data available), *

* *." Section 6103(p)(8)(B) provides,

> Nothing in subparagraph (A) shall be construed to prohibit disclosure by an officer or employee of any State of any copy or any portion of a Federal return which is required to be attached or included in a State return to another officer or employee of such State (or political subdivision of such State) *if such disclosure is specifically authorized by State law.*" [Emphasis added.]

As Cincinnati, with a population in excess of 250,000, qualifies as a "state," the next inquiry is whether the City authorized disclosure of Grogan's federal tax returns by the City's Income Tax Bureau to police officers. Cincinnati Municipal Code 311-61 states,

> Any information gained as a result of any returns, investigations hearings, or verifications required or authorized by this chapter shall be confidential and no disclosure thereof shall be made except to municipal, county, state or federal taxing agencies, or, *except for official purposes*, or except in accordance with proper judicial order. No person shall otherwise divulge such information. [Emphasis added.]

The scope of the term "official business" is broader in Cincinnati Municipal Code 311-61 than in R.C. 718.07, which prohibits disclosure of federal tax returns "except in

accordance with a proper judicial order or in connection with that person's official duties or the official business of the municipal corporation as authorized by this chapter or ordinance authorizing the levy."

The trial court determined that the attachment of Grogan's city and federal tax returns was proper as part of the City's official business and as reasonably necessary for its pleadings. We agree that the attempt to abate a nuisance, like the Elder Cafe was within the exercise of the City's police power and related to the City's official business. As the trial court appropriately found, ownership of the Elder Cafe was unclear from the deed. The deed showed that the premises were owned by Nate's Cafe, Inc. Accordingly, for purposes of the *ex parte* TRO, Grogan's tax returns clarified ownership as well as Grogan's involvement as the corporate president.

There was no violation of confidentiality within the terms of Section 6103, Title 26, U.S.Code or Cincinnati Municipal Code 311-61, and, therefore, Grogan's third assignment of error is overruled.

WINKLER, J., concurs.

PAINTER, J., dissents.

DISSENTBY:
PAINTER

DISSENT

PAINTER, J., dissenting on Grogan's Third Assignment.

Grogan challenges the trial court's entry of summary judgment in favor of the City on his claim that the City had violated R.C. Chapter 718, R.C. Chapter 5747, and Section 6103, Title 26, U.S.Code, by improperly disclosing his city tax returns and his attached federal tax returns. According to Grogan, the City was not entitled to use his tax returns as supporting documents when it filed its nuisance action. (While the City raised the issue of immunity in a filing captioned "Citation of Additional Authority" in support of its motion for summary judgment, the trial court did not address this issue, nor has the City asserted it in its appellate brief.)

In support of its summary-judgment motion on Grogan's counterclaim, the City filed an affidavit in which the audit supervisor of Cincinnati's Income Tax Bureau stated that he had released the tax records concerning Nate's Cafe to the City Prosecutor's office to be used by that office in its official capacity pursuant to Cincinnati Municipal Code 311-61 and R.C. 718.07. The affidavit further stated that the tax records were kept in the ordinary course of the City's business and were released only for use in connection with the City's official business.

The trial court determined that the attachment of Grogan's tax returns was proper as a part of the official business of the City and as a reasonably necessary part of its pleadings. The court found that an attempt to abate a nuisance was within the City's official business, and that the tax returns appropriately showed the ownership of the premises and the extent of activity on the premises. The majority decision of this court agrees with the trial court's conclusion. I do not.

The issue put before this court is whether the City

violated R.C. Chapter 718, R.C. Chapter 5747, and Section 6103, Title 26, U.S.Code, by improperly disclosing Grogan's city and federal tax returns. The City has answered Grogan's appeal by claiming that Cincinnati Municipal Code 311-61 authorized the disclosure.

Generally, the information provided in tax returns is confidential.[48] That confidentiality, however, is not absolute. Under Section 6103, Title 26, U.S.Code, federal tax returns and the information in the returns are confidential unless one of the enumerated exceptions is applicable. Under the "Procedure and recordkeeping" section of the federal statute regarding confidentiality, pertinent state-law requirements are set forth.[49] As a safeguard, Section 6103(p)(8)(A), Title 26, U.S.Code requires that no federal employee disclose federal tax returns or return information "to any officer or employee of any State which requires a taxpayer to attach to, or include in, any State tax return a copy of any portion of his Federal return, or information reflected on such Federal return, unless such State adopts provisions of law which protect the confidentiality of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return." (Cincinnati is a "State" as defined by the federal statute.) Nothing in these provisions, however, "shall be construed to prohibit the disclosure by an officer or employee of any State of any copy of any portion of a Federal return or any information on a federal return which is required to be attached or included in a State return

---

[48] *See* R.C. 718.07.

[49] *See* Section 6103(p)(8), Title 26, U.S.Code.

to another officer or employee of such State (or political subdivision of such State) if such disclosure is specifically authorized by State law."

Under the applicable state law, disclosure of tax-return information is allowed "in accordance with a proper judicial order or in connection with the performance of [the disclosing] person's official duties or the official business of the municipal corporation as authorized by [R.C. Chapter 718] or the charter or ordinance authorizing the levy."

Cincinnati Municipal Code 311-61 states,

> Any information gained as a result of any returns, investigations, hearings or verifications required or authorized by this chapter shall be confidential and no disclosure thereof shall be made except to municipal, county, state or federal taxing agencies, or, except for official purposes, or except in accordance with proper judicial order. No person shall otherwise divulge such information.

I agree with the City that R.C. Chapter 5747 is inapplicable to the tax returns at issue to the extent that the chapter relates to state income-tax returns. State tax returns are not at issue here. In this case, it appears that Grogan released his federal income-tax returns to the City as allowed by the Cincinnati Municipal Code. Thus, the issue to be determined is whether the City violated Cincinnati Municipal Code 311-61 and R.C. 718.07 as they relate to the

confidentiality requirements of Section 6103(p)(8)(b), Title 26, U.S.Code.

R.C. 718.07 limits disclosure of tax information except in connection "with the performance of [the divulging] person's official duties or the official business of the municipal corporation as authorized by [R.C. Chapter 718]" or as authorized by "the charter or ordinance authorizing the levy." R.C. Chapter 718 regulates the subject of municipal taxation, including the levy and collection of municipal income taxes.[50] Thus, the "official duties" or "official business" of the municipal corporation or its employees "as authorized under the statute" clearly limits the disclosure of tax information by the City to tax-related matters contained in R.C. Chapter 718.

The Cincinnati Municipal Code uses the phrase "official purposes" to describe when tax returns or tax information may be disclosed. That term is not defined. The phrase has been judicially defined, however, as it is used in R.C. 5747.18. R.C. Chapter 5747 directs that any undefined term used in R.C. Chapter 5747 "has the same meaning as when used in a comparable context in the internal revenue code, and all other statutes of the United States relating to federal income taxes."[51] The Tenth District Court of Appeals has determined that "federal income tax returns are open to inspection solely by public officials lawfully charged with the administration of state laws, and only if the inspection is for

---

[50] *See Cincinnati Imaging Venture v. Cincinnati* (1996), 116 Ohio App. 3d 1, 686 N.E.2d 528.

[51] *See* R.C. 5747.01.

the purpose of administering such laws."[52] Consequently, in that court's view, "any exception to the confidentiality principle of information included in income tax returns [can] be rationalized only when the requesting party's inspection is directly related to the administration of any state or local tax law."[53] Thus, tax returns should not be released to other public officials "unless it is affirmatively demonstrated that they must have access to them to perform legally delegated duties of administering or enforcing *tax laws* of the state of Ohio or a political subdivision thereof."[54] The fact that this definition of "official purpose" is consistent with the federal income-tax policy of confidentiality confirms its desirability, when Section 6103(p)(8)(A), Title 26, U.S.Code requires the Cincinnati Municipal Code to protect the confidentiality of federal returns.

To accept the City's argument that bringing a nuisance-abatement action is an "official purpose" allowing disclosure of confidential tax information would destroy any semblance of confidentiality. Under the City's interpretation of "official purpose," any city official could obtain tax records for any civil or criminal prosecution without regard to whether the prosecution related to tax matters. A court cannot presume that a legislative body "intended to enact a

---

[52] *See Collins v. Ferguson* (1976), 48 Ohio App. 2d 255, 261, 357 N.E.2d 51, 55.

[53] *See id.*

[54] *See id.* (Emphasis added.)

law producing unreasonable or absurd consequences."[55] The City's interpretation would abrogate the confidentiality accorded tax returns under both Federal and local law.

The remaining provisions of Cincinnati Municipal Code Chapter 311 support this conclusion. The chapter deals with the City's income tax and authorizes the tax commissioner to collect and receive taxes imposed by the chapter, to keep accurate records, and to enforce the provisions of the chapter.[56] The chapter also authorizes the tax commissioner, or any authorized agent of the tax commissioner, to examine federal income-tax returns to verify accuracy.

Cincinnati Municipal Code 311-69 creates a board of review consisting of the city manager or his representative, a designated city official, and the director of finance to conduct private hearings on decisions by the tax commissioner. That same section states that "the provisions of Section 311-61 hereof with reference to the confidential character of information required to be disclosed by this chapter shall apply to such matters as may be heard before the board of appeal." It seems obvious that the "official purpose" referred to in Cincinnati Municipal Code 311-61 pertains to the duties and responsibilities of the tax commissioner, his agents, and the board of review relating to the investigation and administration of local taxes.

---

[55] *See State ex rel. Cooper v. Savord* (1950), 153 Ohio St. 367, 92 N.E.2d 390.

[56] *See* Cincinnati Municipal Code 311-53.

This interpretation is supported by decisions of courts in other jurisdictions regarding their state laws requiring public officials to maintain the confidentiality of income-tax returns.[57] State statutes that make tax-return information confidential by "prohibiting tax or other governmental officials from divulging information contained in income tax returns [have] been not only to protect the individual taxpayer's privacy or his privilege against self-incrimination, but also to facilitate tax enforcement by encouraging the taxpayer to make full and truthful declarations in his returns, without fear that his statements will be revealed or used against him for other purposes."[58] Similarly, Section 6103, Title 26, U.S.Code was enacted to "protect taxpayers' reasonable expectations of privacy" and "to ensure maximal compliance with the Federal tax laws."[59]

Further, I would conclude that Cincinnati Municipal Code 311-61's use of "for official purposes" does not specifically authorize the release of tax information as provided in Section 6103(p)(8)(b), Title 26, U.S. Code. Obviously, if the drafters of the municipal code had wanted specific exemptions to the confidentiality section concerning taxation, the drafters could have included such specific authorization. To hold that the term "for official purposes" is so broad as to specifically authorize an exemption to confidentiality for proceedings unrelated to tax issues would allow the exemption to swallow the general provision for confidentiality.

The City also asserts that Grogan provided tax returns

---

[57] *See* Annotation, Validity, Construction, and Effect of State Laws Requiring Public Officials to Protect Confidentiality of Income Tax Returns or Information (1980), 1 A.L.R.4th 959.

[58] *See id.* at 963.

[59] *See Commonwealth v. Burgess* (1997), 426 Mass. 206, 208, 688 N.E.2d 439, 442.

as a result of discovery requests. The record does not clearly demonstrate this. (Although some reference was made to tax returns in Grogan's deposition, it is not clear exactly what was being discussed, and Grogan's counsel did object to the production of "personal tax returns.") If the record had sufficiently demonstrated that the tax returns at issue had been produced in discovery or that the City had sought the tax records under a proper judicial order, it might have affected my determination to sustain Grogan's assignment. But, based on the record, I would conclude that the trial court erred in granting summary judgment to the City on Grogan's counterclaim asserting improper disclosure. The parties did not raise, and the trial court did not address, what remedy, if any, a violation of this section would occasion. I would leave that issue to be resolved by the trial court. Thus, I would sustain Grogan's third assignment as it relates to this claim and remand this case to the trial court for further consideration.

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, 0HIO

CASE NO. A9900996

CITY OF CINCINNATI, ET AL
Plaintiff,

vs.

JEROME GROGAN, ET AL,
Defendant.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

Lisa C. Allen, Esq., Mark Vollman, Esq.
and James Carroll, Esq.
On behalf of the Plaintiff.

C. J. Schmidt, Esq. and Eric C. Holzapfel, Esq.
On behalf of the Defendant.

BE IT REMEMBERED that upon the hearing of this cause on July 2 and October 21, 1999, February 16-24, March 13, 14 and 21, 2000, before the Honorable Thomas H. Crush, judge of the said Court of Common Pleas, the following excerpt of proceedings were had.

(C) Copyright 2000
VOLUME VII

* * *

[1317]

This is just a snapshot of what went on for three years.

Thanks, Judge.

MR. CARROLL: My voice is failing me. I'm not going to.

THE COURT: Thank you.

MR. HOLZAPFEL: Your Honor, I think I better object to the last statement.

MR. VOLLMAN: Objection to what he is going to say?

MR. HOLZAPFEL: I can object to something you say at closing.

MR. VOLLMAN: I object.

THE COURT: Okay. You can object to anything you want.

What last statement?

MR. HOLZAPFEL: The statement he said this is a snapshot of what occurred in the last three years. There has been no evidence that any of that occurred other than when in the last three .years.

THE COURT: At any rate, whatever. So I have seen the evidence, I have heard it. It has been going on for weeks. It's not a difficult [1318] case.

The first issue is whether -- I suppose the first to address is was there a nuisance.

Now, the evidence is replete with people who complained the only reason this case exists is that a number of people in the area complained about drug and other activity at the Elder Cafe.

So a nuisance is something, in general terms, that bothers other people.

If this had never bothered anybody, I guess nobody would ever have complained.

Obviously, it bothered enough people they got City Council to do something.

So there is this general evidence that there was a nuisance, because people complained.

Then we have evidence from several people, police officers and neighboring businesses specifically, that there appeared to be drug transactions occurring around the bar and in the doorway to the bar, which would put it in the bar or on the bar premises, so that evidence is in here.

Now, of course, is what they saw or was what they saw actually a drug transaction or not?

Well, I think, the evidence of the police [1319] officers who observed them--- I think there is some misinterpretation about Officer Robbins' testimony.

He basically testified at one point that he saw no felonies, which he understood to mean, I believe the record makes clear, felonies where there were convictions. And later he was asked did there appear to be drug transactions. He said "yes."

I don't think there is any lying there. I think it's perhaps a matter of semantics or perhaps what you're talking about in each case.

Anyhow, he had the experience of a police officer that said he saw what appeared to be felonies.

Finally, we have this list here, which was accomplished over a period of six weeks, which indicates that there were, indeed, drug transactions on the premises. And you can characterize them as you wish, but a number of them -- it certainly wasn't true -- occurred on the premises.

Certainly, the Tyrone Mallory case occurred inside the bar and as did the Tony Lee case.

[1320]

And the Kirksey case, that's hard to say what happened there. Apparently, I think it's proven, I think adequately, that he left the bar with Percocet in a box. So the placing of the Percocet in the box or the obtaining the box occurred within the bar.

The Ricky Dyer case, of course, occurred in the bar, but it was a possession-type offense.

The Haygood thing occurred in the bar.

The Soncha Newton case was observed to have occurred inside the bar. And although there was a capias, the evidence is adequate, for purposes of this trial, that an offense occurred within the bar.

The Alonzo Robinson matter occurred within the bar.

And we only need clear and convincing evidence. We don't need a conviction here in this case.

And the Jacob Drew matter occurred within the bar, but was a pure possession case.

I think six of the eight were not pure possession cases.

That's an awful lot of drug activity in the one place. I think we can extrapolate from [1321] this. We can't 'pretend this occurred in a vacuum; we can extrapolate from six; weeks' of activity that this occurred, this type of activity occurred, before this particular investigation; because there was evidence over a period of years that drug transactions occurred and were occurring.

And when the police actually investigated carefully they found, sure enough, they were occurring and drugs were found on the premises many times.

So I don't think there is any question. I think it is proven beyond pari inventio, beyond a reasonable doubt, that this bar was a nuisance in relation to the drug transactions and possessions.

A possession for sale is not merely a possession offense.

That it was a nuisance in the drug transactions that occurred there and the attraction to drug dealers and users that it presented in the area.

The defense said and the prosecution said this is a high-crime area. Now, the defense has used that, I think, as a defense. I don't [1322] consider that to be a defense.

You know, bars are closely regulated in Ohio because they so easily become a source for mischief.

Bars are not like pubs in England, where it's a family-type affair and people go in and socialize.

Bars are places where people go in to drink. And people who just drink are always getting in trouble. So bars are closely regulated.

If you're in an area, say near UC, like a college or a

high school, you know going in you're going to have problems from young people trying to pretend to be older and get booze. Now, that's no excuse. I don't think anybody accepts that as an excuse for selling to a young person. That's simply one of the challenges you have if you're going to operate in that area. You're going to have somehow not to serve young people. If you do, you're going to get zapped.

If you open a bar next to the Drop-Inn Center, you know you're going to get patrons who are going to drink to excess, which you're not to allow and you have to take care to make sure they [1323] don't drink to excess.

The law doesn't care how you do it; you have to do it.

If you're going to have a bar operating in a high crime, high drug-trafficking area, then you have got to take extraordinary steps. Not merely sit there and do nothing; take extraordinary steps to make sure that your bar doesn't become a haven for drug dealing.

The testimony is other bars in Over-the-Rhine didn't have this problem. Maybe one other did.

This place had become a haven for drug use, drug abuse and drug selling.

I don't think there is any question. I'm not going to say much about that; that it was a nuisance.

The question, real question, is did the defendant -- defendants -- know about it.

And, again, we have a lot of evidence that they did or should have.

Again, the head-in-the-sand business, I think, is probably the best description of what occurred here.

Mr. Grogan, the evidence is clear, did [1324] not work in this bar. He was an absentee landlord even when he was there. He was on another floor of the building. He had, at least part of the time -- Most of the time he had a camera looking at the cash registers. That was his primary focus. Later, he got one that showed part of the bar. But he came in in the morning and, by his own testimony, generally left mid-morning. Sometimes came back.

But, I think the evidence is clear his general work habits were only two, three, four hours a day at the bar, in his office, and he would come back occasionally. So he wasn't even there when the main problems occurred, which were later in the day and later at night.

I mean, he might as well not have been there for all the usefulness that he was to this operation. He personally did not get in the bar, serve the drinks or watch the customers and so forth.

The people he had in there were minimum-wage people, apparently from the area, the same area as the people there they were serving.

And for that amount of money, I don't think there is any great incentive to them to [1325] stand up to drug dealers or anybody else or even to look for drug dealers.

You can't operate in a high-crime area and not even be there and expect a couple of minimum-wage employees to properly police the bar.

I think that's the source of the problem. All the problems here is that the person who had the most interest in the bar, the most to gain from it, .didn't do hands-on work.

I don't know much about running a bar, but I have had several cases over the years as a judge and represented people as a lawyer. I know the saying is you can make a lot of

money in a bar, but you better watch it because people are going to steal from you.

Well, he had the camera to scare the people from stealing, but in a high drug-transaction area you have to watch out for drugs.

So, then, he had notice of it. Well, to whatever extent he did have notice of it, it can be only attributed to negligence or willful blindness, because he had the hearing before the City; they had the hearing up in Columbus; they had -- at least he or his emp!oyess had -- several [1326] conversations off and on about drugs; the police swept in there regularly.

And I think, as has been pointed out, the fact that he knew there was a drug problem was evident, because he took steps which were inadequate and insufficient, but he took steps to do something about the drug problem.

He, himself, testified he fired the floor walker just to make a point. He installed a camera in the pool area; changed the glass in the front door; increased the time that he was there a couple hours extra.

But he wasn't in the bar He was -- As far as I know, there was no testimony ever stated in the bar area. He was upstairs. He talked to the employees about it every day, he said. And put a security mirror in and some signs. And at one point, I think earlier, a picture window.

Now, those really were minimal things in a way, because the camera meant nothing, since it's obvious you're not going to -- there is no reason to believe and I don't think he testified he sat there watching that camera all day.

He looked at it periodically as he worked, obviously. And that isn't going to [1327] demonstrate much, looking at a small TV screen, which everybody knows about, isn't going to show you anything. It would be hard to tell what is going

on and someone can easily stand out of range of the camera, since it showed only part of the store.

Then so far as taping, he only taped two hours in six months or whatever. That's not much in the way of tape.

So that wasn't very adequate. And some of the other things obviously didn't work.

I'm not sure what he could have done, but it isn't hard to imagine one of the things he could have done was simply to remove that in step in the entrance way, for instance, so people couldn't stand in there semi-concealed from the public. Just have a flat front. And that, alone, would have stopped people from standing in his doorway. That wouldn't have been hard. Even I can figure that out without thinking about it. More light in the bar. Hiring real security people for awhile to chase people away from the bar, tell them not to loiter.

There is a lot of things that might have been done. And maybe with the operation he had it [1328] would have been impossible to abate the nuisance. I don't know. But I don't believe the defendant made an honest or reasonable effort to abate it.

If he couldn't abate after all reasonable efforts, then maybe there shouldn't be a bar there.

But in any case, I don't see how he could not have known about the problem. I don't know there is any question that there was a problem.

And it's obvious he didn't do enough to try to stop it. He wouldn't call the police. He didn't talk to the police. He didn't ask for advice He said several times he didn't believe the officers. And other people have said there was a problem.

He said -- You don't believe there is a problem, there

is no motivation to correct it, which I think explains a lot.

The basic problem here was it was not a hands-on operation. Other people operated it even when he was there.

He didn't believe the complaints about the bar. He wasn't even aware of what was going on, because he never looked at it. I don't know what to say about a [1329] situation like that. I don't want to dump on the man or at least that probably is enough the bar has been closed and it's a terrible shock financially, but he just hid from the problem.

He wouldn't face it. He wouldn't do anything about it. He doesn't believe the police officers. Everybody is lying. There is a giant conspiracy; the entire neighborhood council and everybody else.

If he were a hands-on worker, in a position to deny what they're saying, that would be one thing.

He has no idea what went on in the bar more than anybody else, because he wasn't there.

So I think the evidence is clear. I think it's clear and convincing of it beyond a reasonable doubt that there was a nuisance on these premises; that it had been going on for a long time and constantly kept getting worse as time went on.

The Defendant had notice of it; took inadequate steps to correct it. And here is where we are today.

So I would find on behalf of the plaintiffs. I don't know about the costs, because [1330] the costs, it seems to me, were just normal police activities. T

here weren't any costs in there that wouldn't have been incurred anyway, would it?

MR. VOLLMAN: I guess the boarding up, Judge.

THE COURT: Pardon me?

MR. VOLLMAN: The boarding up and maybe even the City attorney fees.

THE COURT: How much was that?

MR. VOLLMAN: I guess we haven't calculated that. We can make an application to the Court.

THE COURT: The boarding up; the City attorneys' fees. You're paid a salary, aren't you?

MR. VOLLMAN: Yes.

THE COURT: Whether you boarded this up or not, there would be something else you would be doing. I don't think that cost the City anything.

I would award whatever the cost of the boarding is if you have got that separately maintained.

I don't want to have a hearing on that. If I have to, I will. But the boarding up, [1331] whatever the lumber ccsts and if it was done by an independent contractor, you were charged for it; otherwise, you can charge for the lumber.

But, the injunction will continue.

Present me an appropriate entry. Present me an entry by next week, the twenty-first, at nine o'clock.

You can have all the objections you want.

MR. HOLZAPFEL: Your.Honor, very briefly. The injunction will continue for how long?

MR. SCHMIDT: There is no nuisance; the bar is out of business.

MR. VOLLMAN: The statute is pretty clear.

THE COURT: It's one year, right?

MR. VOLLMAN: One year from the date of the decision on the final merits.

THE COURT: If you can get me the decision sooner --

MR. HOLZAPFEL: No, Judge, it's one year from the date of the restraining order, which is a year already expired.

THE COURT: What's the statute? You got it there.

MR. VOLLMAN: Yes.

[1332]

MR. HOLZAPFEL: Your Honor, we would also -- Just one second.

THE COURT: That was one of the problems with delaying the case to begin with.

MR. VOLLMAN: It would be pretty academic if it's one year from the date of the initial closing. We're already past the one year. What did we just spend six weeks doing?

MR. HOLZAPFEL: We were arguing it wasn't properly closed. The fact is the statute says a year; the year is expired.

THE COURT: I'll check the statute. I'll read the statute.

MR. HOLZAPFEL: Your Honor, while we're looking for the statute, we also request findings of fact and conclusions of law.

THE COURT: I just gave them. You can have the court reporter type it up.

MS. ALLEN: Can I hand it to you, Judge? I marked up City property. It goes on to say "shall."

THE COURT: Don't make me read two pages. Point it out to me.

MS. ALLEN: Shall require.

THE COURT: Okay. 3767.06. "The order [1333] shall also require the renewal for one year of any bond furnished by the owner of the real property, et cetera; if a bond was not so, shall continue for one year any closing order issued at the time of granting the temporary injunction."

MR. HOLZAPFEL: That's right. Temporary injunction was granted over a year ago. Was granted on February 25, I think.

MS. ALLEN: It doesn't it say at the date of hearing shall continue.

THE COURT: "Shall continue for one year any closing order issued at the time of granting the temporary injunction."

MR. HOLZAPFEL: Right, the year runs from the granting of the temporary order.

THE COURT: "Or, if the closing order was not then issued, shall include an order directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year unless sooner released."

MR. VOLLMAN: One year from the final order.

MR. HOLZAPFEL: No, not if it is closed for a year.

[1334]

THE COURT: Or if a bond was not so furnished.

MR. VOLLMAN; There was none. There was none in this.

THE COURT: "Shall continue for one year any closing order issued at the time of granting the temporary injunction."

MR. HOLZAPFEL: That's what it says. One year after the granting.

Closing order was in the granting of the temporary injunction and it shall continue for one year after that. It never says that it's closed for two years.

MR. VOLLMAN: There is what the Court is ordered to do.

THE COURT: I'm reading. It is a bond is not issued, a bond issued at the time of the closing of the temporary injunction.

MS. ALLEN: When I read it with the sentence before, iti "shall require renewal of the bond."

MR. HOLZAPFEL: There was no bond.

MS. ALLEN: I know. If you let me finish, if you read the entire sentence, "if a bond was posted shall require renewal of the [1335] bond."

THE COURT: I don't think the statute contemplated a delay this long in a trial, but this is a delay that the

defendant basically wanted. So I'm not sure what it means.

It says if a bond was not furnished, continue for one year any closing order issued at the time of granting of the temporary injunction.

Then the next thing, "or if the closing order was not then issued, shall include' an order directing the effectual closing of the place where the nuisance is found to exist against its use for one year unless sooner released."

MR. HOLZAPFEL: I think the thrust of it, if you closed it, the temporary retraining order left, that's when the year starts.

If you don't close it at the temporary restraining order level and it's later found to be a nuisance, the year goes from when you ultimately make that decision.

But here you have already closed it for a year.

THE COURT: Yes, that's very possible.

MR. HOLZAPFEL: It doesn't say two years.

[1336]

MS. ALLEN: I read it. That's the way I read it was from the date of the Court's decision.

THE COURT: Well, folks, you can argue that in one week.

MR. HOLZAPFEL: Okay.

THE COURT: If you'll write a brief, make it brief.

Mr. HOLZAPFEL: A brief brief.

THE COURT: I'll look at that issue. On the 21st, we'll have a hearing on the entry with regard to whether the closing is over or whether it goes on for another year and you can also bring in the amount of the boarding it up.

MR. SCHMIDT: It was done by the police.

MS. ALLEN: Building department.

MR. HOLZAPFEL: Or building cost.

THE COURT: If it was costs that wouldn't normally be done. I guess they wouldn't normally have bought some wood. At least, we have some wood purchased.

If the police did it, I don't think -- I don't want any costs attributable to the defendant that were costs that would have been incurred whether or not this problem existed. So that would be standard salaries for police.

[1337]

Now, if overtime occurred for this particular incident, that might be awarded.

THE COURT: All right.

MR. HOLZAPFEL: All right, Judge. Thank you.

MR. VOLLMAN: Thanks, Judge

THE COURT: We better set a time.

THE COURT: 1: 3 0.

(THE PROCEEDING WAS CONTINUED IN PROGRESS.)

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-9900996

March 24, 2000, filed

CITY OF CINCINNATI, ex rel.
CITY PROSECUTOR
TERRENCE R. COSGROVE

and

STATE OF OHIO, ex rel.
ATTORNEY GENERAL
BETTY D. MONTGOMERY

v.

JEROME GROGAN

and

NATE'S CAFE, INC.
A.K.A. ELDER CAFÉ

JUDGE THOMAS CRUSH

FINAL JUDGMENT ENTRY

This matter came to be held upon the Verified Petition with Affidavit Attached of Relators filed on February 25, 1999 against Respondents Jerome J. Gogan and Nate's Cafe, Inc. alleging that the Elder Cafe located at 128 W. Elder

Street, Cincinnati, Ohio is a nuisance as defined by R.C. §3719.10 and requesting among other things, that pursuant to R.C. §3767.06(A) a permanent injunction be issued closing the premises from any use for a period of one year. After a trial to the Court and full consideration by the Court of the evidence admitted therein, the Court enters judgment in favor of Relators, City of Cincinnati, ex rel., City Prosecutor Terrenee R. Cosgrove and State of Ohio, ex rel. Attorney General Betty Montgomery.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the evidence admitted at trial including but not limited to the evidence of the eight (8) felony violations of Ohio Revised Code Chapter 2925 (summarized on the chart attached hereto as Exhibit A) that occurred on the premises of the Elder Cafe located at 128 W. Elder in the Findlay Market neighborhood, was clear convincing evidence that the Elder Cafe, owned and operated by Respondents Jerome Grogan and Nate's Cafe, Inc., is a nuisance as defined by the Ohio Revised Code and Respondent Jerome Grogan and Nate's Cafe, Inc. are permanently enjoined from maintaining such nuisance at the aforesaid location;

2. That the Elder Cafe, owned and operated by Respondents, Jerome Grogan and Nate's Cafe, Inc., located at 128 W. Elder Street, Cincinnati, Ohio, is hereby closed for any purpose for a period of one (l) year commencing March 14, 2000 and ending March 13, 2001, and Respondents, Jerome Grogan and Nate's Cafe, Inc. are enjoined from entering the Elder Cafe premises for the aforesaid one (1) year period;

. . .

4. That Respondents, Jerome Grogan and Nate's Cafe, Inc. shall pay to Relators per R.C. 3767.06(B) the sum of $894.95 for the costs of closing the Elder Café.;

. . .

6. That Respondents, Jerome Grogan and Nate's Cafe, Inc. shall pay the costs of this action.

SO ORDERED.

_____
Judge Thomas Crush

/s/_____
MARK C. VOLLMAN (0007040)
LISA C. ALLEN (0016891)
City Hall, Room 226
801 Plum Street
Cincinnati, Ohio 45202
Trial Attorneys for Relator Terrence R. Cosgrove,
City Prosecutor

/s/_____
JAMES M. CARROLL (0016177)
Assistant Attorney General
1600 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
Trial Attorney for Relator Betty D. Montgomery
Attorney General

/s/_____
ERIC C. HOLZAPFEL (0012276)
C.J. SCHMIDT (0034030)
Trial Attorneys for Respondents Jerome J. Grogan
and Nate's Cafe, Inc. a/k/a Elder Cafe
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202

FOLD OUT EXHIBIT

EXHIBIT A

Case # A990996
Cincinnati et al vs. Jerome Grogan & Nate's Cafe, Inc.

Felonies Proved – Elder Cafe

Defendant's Name	Date/ Offense(s)	Location of Offense(s)	Charged w/ Felony Drug Offense(s)	Convicted of Felony Drug Offense(s)	Facts
1. Tyrone Mallory, City Exs. 15 & 20	12/30/98 Trafficking in drugs RC 2925.03 (A) [F-5]	Inside Elder Cafe 128 W. Elder St.	Yes (B-9900345)	Yes Trafficking in drugs RC 2925.03 (A) [F-5]	Defendant, Tyrone Mallory, approached undercover police (Officer Darris Sneed) and offered to sell him marijuana inside Elder Cafe. Defendant was immediately arrested and marijuana was recovered from his person.
2. Tony Lee City Ex. 14	1/5/99 Preparation for sale RC 2925.07 (A) [F-5]	Inside Elder Cafe 128 W. Elder St.	Yes (B-9900175)	Yes Preparation for sale RC 2925.07 (A) [F-5]	Defendant, Tony Lee, was observed by surveillance officer (Sgt. Jeff Hunt) making drug deal at the front door of Elder Cafe, after which Defendant immediately went into Elder Cafe. Defendant was searched and 3 "dime" bags of marijuana were recovered from his person.
3. Charles Kirksey City Ex. 13	1/26/99 Poss. of Heroin RC 2925.11(A) [F-5] Prep. of Heroin for sale RC 2925.07 (A) [F-4] Agg. Poss. of drugs RC 2925.11 (A) [F-4] Agg. Prep. of drugs RC 2925.07 (A) [F-4]	Inside Elder Cafe 128 W. Elder St. (possession) 1830 Logan St. (trafficking)	Yes (B-9900729)	Yes Poss. of Heroin RC 2925.11(A) [F-5] Agg. Prep. of drugs for sale RC 2925.07 (A) [F-4]	Recognized as a drug dealer by surveillance officer (Officer Matt Martin), the defendant, Charles Kirksey, was observed as he entered Elder Cafe and came out minutes later with a cheese coney box. Defendant immediately went to Logan St. and Campbell Alley where he was observed by police selling Percocet pills from the cheese coney box. Defendant was arrested and 54 Percocet pills and 7 bindles of heroin were recovered from the cheese coney box.
4. Ricky Dyer City Ex. 10	1/27/99 Agg. Poss. of drugs RC 2925.11 (A) [F-5]	Inside Elder Cafe 128 W. Elder St.	Yes (B-9900754)	Yes Agg. Poss. of Heroin RC 2925.11 (A) [F-5]	Defendant, Ricky Dyer, submitted to police search of his person while in Elder Cafe. Percocet tablets recovered from front pant's pocket by Sgt. Jeff Hunt.
5. Melvin Haygood City Ex. 11	2/2/99 Trafficking in Marijuana RC 2925.03 (A) [F-5], Prep. of Marijuana for sale RC 2925.07 (A) [F-5]	Inside Elder Cafe 128 W. Elder St.	Yes (B-9900907)	Yes Trafficking Marijuana RC 2925.03 (A) [F-5]	Defendant, Melvin Haygood, sold marijuana to undercover officer (Officer Chauncey Price) for $20.00 inside Elder Cafe bathroom. Defendant arrested. Marijuana was recovered from his person.
6. Soncha Newton City Ex. 12	2/10/99 Agg. Trafficking RC 2925.03 (A) [F-5]	Inside Elder Cafe 128 W. Elder St.	Yes	Failed to appear Capias issued	Inside Elder Cafe, defendant, Soncha Newton, gave crack cocaine to codefendant Melvin Haygood who then sold it to undercover officer (Officer Howard Fox) for $10.00 in bathroom of Elder Cafe
7. Alonzo Robinson City Ex. 16	2/10/99 Poss. of Heroin RC 2925.11 (A) [F-4]	Inside Elder Cafe 128 W. Elder St.	Yes (B-9901156)	Yes Possession of Heroin RC 2925.11 (A) [F-4]	Defendant, Alonzo Robinson, observed by covert police surveillance (Officer Nate Young), entering Elder Cafe and made drug deal within view (through front window) of surveillance Officer Young. Defendant immediately exited bar and was arrested by uniformed officers. Heroin was recovered from his hat.
8. Jacob Drew City Ex. 9	2/12/99 Agg. Poss. of drugs RC 2925.11 (A) [F-5]	Inside Elder Cafe 128 W. Elder St.	Yes (B-9901656)	Yes Agg. Poss. of drugs RC 2925.11 (A) [F-5]	Defendant, Jacob Drew, observed by police surveillance (Sgt. Jeff Hunt), as he entered Elder Cafe and exited minutes later. Defendant was stopped by uniformed officers and searched. Percocet pills were recovered from his person.

BEST AVAILABLE COPY

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

Case No. A-99-00996

August 13, 1999, entered

CITY OF CINCINNATI, ex. rel., et. al.
Plaintiff

v.

JEROME GROGAN and
NATE'S CAFE (aka ELDER CAFE),
Defendant

DECISION RE: MOTIONS FOR SUMMARY JUDGMENT, MOTION TO STRIKE, AND MOTION FOR SANCTIONS

Crush, J.

This matter is before the Court (1) upon motion for summary judgment filed 5/21/99 on behalf of respondents Grogan and Nate's Cafe, Inc.; (2) upon motion for summary judgment filed 6/15/99 on behalf of relators; (3) upon supplemental motion for summary judgment filed 7/26/99 on behalf of relator City of Cincinnati; and (4) upon motion to strike and for sanctions filed 7/29/99 on behalf of respondents Grogan and Nate's Cafe, Inc.

MOTION OF DEFENDANTS TO STRIKE THE AFFIDAVIT OF DETECTIVE PAUL VON HOLLE AND FOR SANCTIONS

Respondents allege that Detective Paul Von Holle, acting for relators' attorneys, qestioned James E. Johnson, an employee of defendant Nate's Cafe, Inc., without the permission of respondents' counsel. Johnson's affidavit, dated 7/28/99 and attached to respondents' motion, states that he "is" an employee of Nate's Cafe, Inc. and has worked there the past five years. Respondents argue that this questioning of a party's employee violated DR 7-104(A) (1) of the Code of Professional Responsibility; and that the requested striking and sanctions are appropriate sanctions for violation of said disciplinary rule.

Respondents' arguments are countered by relators' counsel who point out that on March 7, 1999, Mr. Johnson, testifying under oath before the Liquor Control Commission, stated "Sir, I'm retired".

Additionally, the following colloquy occurred between the Court and one of respondents' counsel at the hearing on the motion to strike on 8/5/99:

> COUNSEL: He is employed by us, and he is on our payroll.
>
> THE COURT: You're still paying him money?
>
> COUNSEL: We are not paying him. We have no income and couldn't. The city hasunconstitutionally closed our bar. How can we pay when we don't have a bar to operate under?
>
> THE COURT: If you are not paying him, how is he your employee?

COUNSEL: He works for us, your Honor.

THE COURT: Is he on leave of absence?

COUNSEL: He is On temporary layoff...until we can get the matter cleared up.

From the foregoing, it is evident, from respondents'own admission, that Johnson was not an employee of respondents at the time Detective Von Holle took his statement. Respondents' apparently are arguing that (1) since Johnson was caused to have been unemployed by an allegedly unconstitutional act of relators, relators could not take advantage of his unemployment to take his statement; or (2) because Johnson may again become an employee of Nate's Cafe in the future, he must be treated, for purposes of ethical considerations, as though he were currently an employee of the cafe. Respondents' counsel have presented no law to support either of these propositions of law.

In the Court's opinion, because the evidence is clear that at the time his statement was taken by Detective Von Holle, Johnson was not respondents' employee, respondents' motion to strike and for sanctions is not well-taken.

RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Respondents' motion for summary judgment is summarized on the first page of their brief: "... (R) espondents did not participate in the conduct allegedly constituting the nuisance and... (relators') action of closing Nate's Cafe, Inc. from further operation violates respondents' constitutional rights."

The basis for the motion is found in *State, ex rel. Pizza v. Rezcallah* (1998) 84 Ohio St. 3d 116, 702 N.E. 2d 81, the syllabi of which read as follows:

> "1. R.C. 3767.02 does not require proof of knowledge of, acquiescence to, or participation in the creation or perpetuation of a nuisance in order to find an owner of a nuisance guilty of the civil offense of 'maintaining a nuisance.'
>
> "2. To the extent that R.C. 3767.06(A) requires a trial court, upon a finding of a. nuisance, to issue an .injunction closing property against its use for any purpose for one year, and to the extent that it allows release from such injunction only through the filing or renewal of a bond in the full value of the property, the statute violates the Fourteenth Amendment Due Process Clause and the Fifth Amendment Takings Clause of the United States Constitution, and Section 19, Article I of the Ohio Constitution, when applied to an owner who did not negligently or knowingly acquiesce to, and did not participate in the creation or perpetuation of the nuisance. (*Lindsay v. Cincinnati* [1961], 172 Ohio St. 137, 15 O.O.2d 278, 174 N.E.2d 96, overruled.)"

Respondents' argue that *Pizza* forbids a relator from obtaining an injunction until he has proven that the owner participated in, and knowingly acquiesced in, and negligently acquiesced in, the creation or perpetuation of the nuisance. Respondents further argue that relators in the instant matter have not proven any, and certainly not all, of the three items of proof needed for an injunction.

Respondents' interpretation of the wording of the second syllabus is erroneous in that the second syllabus clearly, means that a relator cannot obtain an injunction for a year against a respondent who neither (1) negligently or knowingly acquiesced in the creation or perpetuation of a

statutory nuisance, nor (2) participated in the creation or perpetuation of the nuisance. In other words, if the respondents did any one of the three things enumerated (negligently acquiesced, knowingly acquiesced, participated), an injunction is appropriate.

The body. of the *Pizza* decision further explains the rationale of the syllabi:

> "R.C. 3767.02, which defines the offense of maintaining a nuisance, is clear and unambiguous and does not include a requirement of knowledge, acquiescence, or participation on the part of an owner of the property deemed to be a nuisance. We thus hold that R.C. 3767.02 does not require proof of acquiescence to or participation in the creation of a nuisance or the conduct constituting a nuisance in order to find an owner of a nuisance guilty of the civil offense of 'maintaining a nuisance.'
>
> "Proof of an owner's knowledge, acquiescence, or participation is relevant, however, in determining which statutory remedies may be imposed once the owner is found guilty of maintaining of a nuisance. Because R.C. Chapter 3767 provides exceptions to the imposition of a temporary closing order at the preliminary injunction stage, and prevents imposition of a tax against property owners who have abated the nuisance prior to the completion of the civil action, these remedies may not be applied against an innocent owner who has acted in good faith and has abated the nuisance prior to the commencement of the civil action."

* * *

> "We have previously held that 'it would be inappropriate to balance the equities or require the [state] to do equity in [a statutory]. * * * injunction action because * * * injunctions which authorize a governmental agent to sue to enjoin activities deemed harmful by the General Assembly are not designed primarily to do justice to the parties but to prevent harm to the general public." *Ackerman v. Tri-City Geriatric & Health Care* (1978), 55 Ohio St.2d 51, 57, 90.O.3d 62, 66, 378 N.E.2d 145, 149. *Ackerman* clearly states that "statutory injunctions should issue if the statutory requirements are fulfilled.' *Id.* at 57, 9 O.O.3d at 66, 378 N.E.2d at 149." (Page 87)

If the owner is innocent and has abated the nuisance *before* the filing of suit, he may not be subjected to statutory penalties. It is evident that *Pizza* does not prevent the Court from finding that property innocently owned is *currently a* nuisance. *Pizza* does not clearly state the procedure to be followed if the owner claims innocence *after* the suit has been filed. Neither the statute nor *Pizza* clearly states whose burden it is to raise the issue of innocence or to prove or to disprove innocence; i.e., whether the person seeking the injunction must demonstrate non-innocence to obtain the injunction, or whether the owner must demonstrate innocence to avoid the harshest penalties. Certainly, a nuisance cannot be permitted to continue simply because the owner is innocent, as *Pizza* states.

In any event, the issue of whose duty it is to raise the issue of innocence, and when to raise it, is moot, since the relators raised the issue and demonstrated non-innocence at both the motion for temporary restraining order, and the motion for preliminary injunction.

The criteria of *Pizza* were facially met in the filing of

the petition and the issuing of temporary restraining order because of Sergeant Hunt's affidavit attached to the petition. That affidavit referred to a discussion with Mr. Johnson, at that time an employee of Nate's Café:

> "12. I had a discussion with Mr. Johnson regarding the constant problems at the Cafe. Mr. Johnson told me that he sees 'transactions' occurring all the time in the Cafe. Despite that, none of the calls to the Elder for drug activity have been initiated by the workers in the Cafe."

Mr. Johnson's alleged knowledge of drug transactions, attributable to his employer, amounted to knowing acquiescence in the nuisance on the part of the owner. Mr. Johnson's knowledge provides sufficient evidence to permit the filing of an action and the obtaining of a temporary restraining order without prior notice. *Pizza* does not require that the question of owner innocence be fully litigated before the filing of a complaint or the issuing of a temporary restraining order. In the instant matter, the issue of innocence will be finally litigated and determined at trial upon the issue of permanent injunction.

In view of the foregoing, and pursuant to the rationale of *Pizza,* there was no need in the instant matter for the relators to give the owner notice prior to the filing of suit, nor prior to the obtaining of a temporary restraining order.

Following the issuance of a temporary restraining order, a hearing on a motion for preliminary injunction was held on March 18, 1999.

By entry journalized March 22, 1999, this Court found that "The preliminary injunction sought in the above-captioned matter by plaintiffs is hereby granted." Respondents cannot, by summary judgment motion, appeal from this finding which was made after an evidentiary hearing and

which is in effect only until a permanent injunction is issued or denied. Rather, Respondents, by their summary judgment motion, are effectively seeking judgment in their favor against relators' demand for a permanent injunction.

Summary judgment may be awarded only when the pertinent facts are not in dispute. The Court does not weigh conflicting evidence in deciding a summary judgment motion. The following criteria apply to motions for Summary judgment:

> "Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations ... show that there is no genuine issue as to any material fact ... No evidence or stipulation may be considered except as stated in this rule."
> *[Civil Rule 56(C)]*

> "... (T)he party against whom the motion for summary judgment is made...[is]...entitled to have the evidence or stipulation *construed* most strongly An his favor."
> *[Civil Rule 56 (C)]*

> "...If an issue is raised on summary judgment, which manifestly turns on the credibility of a witness because his testimony must be believed in order to resolve the issue, and the surrounding circumstances place the credibility of the witness in question, the matter should be resolved at trial, where the trier of facts has an opportunity to observe the demeanor of the witness."
> *(Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163; headnote #2)

"It is not the province of the trial court in ruling on a motion for summary judgment to weigh evidence, assess its probative value, decide factual issues, or choose among reasonable inferences."
(Monitor-Rentenbach v. Bethlehem Steel. Corporation; Cases Nos. C-89-0354, C-89-0373; Court of Appeals, First Appellate District; decided 6/20/90; page 3; unreported)

"It is then beyond argument that before a court can render summary judgment there can be no genuine issue of material fact in dispute. See *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 617 N.E.2d 1068. This court has written repeatedly that when a trial court uses summary judgment to terminate litigation, it cannot assess the credibility of the witnesses or the weight of the evidence in determining if there is an actual need for a trial. *Smith v. Cincinnati Gas &Elec. Co.* (1991), 75 Ohio App.3d 567, 600 N.E.2d 325."
[*Hiss v. Kleisinger*; Case No. C-91-0689; Court of Appeals, Hamilton County; decided 9/16/92; unreported]

"The trial court issued an eleven-page explanation of its judgment, captioned "Findings of Fact and Conclusions of Law on Summary Judgment.' Because summary judgment assumes that genuine issues of material fact are not in dispute, findings of fact and conclusions of law, pursuant to Civ. R. 52, and summary judgment, pursuant to Civ. R. 56, are incompatible."
[Ogle v. Kelly (1993), 90 Ohio App.3d 392, 395]

"It is not the province of the trial court in

> ruling on a motion for summary judgment to weigh evidence, assess its probative value, decide factual issues, or choose among reasonable inferences."
> *(Monitor-Rentenbach v. Bethlehem Steel Corporation;* Cases Nos. C-89-0354, C-89-0373; Court of Appeals, First Appellate District; decided 6/20/90; page 3; unreported)

In support, of its opposition to respondents' motion for summary judgment, relators have presented the following evidence:

> 1.) "Mr. Johnson said he was the bartender who worked the evening shift at the Elder Cafe. Mr. Johnson stated he had observed the use of illegal drugs on the premises of the Elder Cafe and also had observed the sale of illegal drugs on the premises of the Elder Cafe. Mr. Johnson indicated on the several occasions that he did witness he consumption of illegal drugs on the premises and/or the sale of illegal drugs on the premises he would ask them to leave. Sometimes the patrons complied and sometimes they wouldn't leave the premises. Other times, the offenders would leave the premises upon request and then return." (Affidavit of detective Paul Von Holle, executed 7/20/99)

> 2.) "I had a discussion with Mr. Johnson regarding the constant problems at the Cafe. Mr. Johnson told me that he sees 'transactions' occurring all the time in the Cafe. Despite that, none of the calls to the Elder for drug activity have been initiated by the workers in the Cafe." (Affidavit of sergeant Jeff Runt, executed 2/25/99)

3.) "Q .... (O) the... (bars)...that are in this so-called high crime area...seem not to have the problems experienced at the Elder Cafe ...What is the difference between how those bars are run and the Elder Café?

* * *

"A. Other places, the owner or manager was always on site. Took a very active interest. They were good citizens, if you will, in that they contacted the police if there was any problems. They did not tolerate any misbehavior, any kind of criminal conduct. They called and reported it. They were active in prosecution and follow-up.

"Q. Okay. Have you seen that happen in the Elder Cafe?

"A. No, ma' am

THE COURT: How long was that lacking in the Eider Cafe?

THE WITNESS: At least the year that I have been there, Your Honor."

(Sworn testimony of Captain Vincent Demasse, hearing 3/18/99, page 55)

4.) "Q. So here we have a neighborhood bar that is predominantly black that serves an area which is very poor and everybody is surprised, sounds like, that those people, a lot of the people that frequent that bar use marijuana?

"A. Oh, I'm not surprised, not about that at all

> and * * * I don't think the Elder Cafe is the only place where you can experience the sale or the use of marijuana or other drugs around this neighborhood...I think that a number of people have made comment over and over that the major problem with the Elder Cafe will be with just the participation of the ownership and management in not allowing that to happen on and in front of their premises. There is no other small business, around the market square, inside the market square that tolerates the loitering, the public intoxication, the open flask, the drug use or abuse that everybody witnesses in front of the Elder Cafe. They call it [the?] police. They actively come out ans shoo people off, you. And so that, that's, I think, the major problem here .... It gets down to management." (Sworn testimony of Thomas Jackson; at liquor license hearing 7/17/98; transcript pages 41, 42; Jerome Grogan present.

> 5.) "Q. You've heard an awful lot of testimony here today from members of the Police Division, as sell as citizens, as well as, basically, business people associated with Findlay Market and regarding what they allege is your - What are your instructions to your employees who operate this business when (sic) there regarding people on the sidewalk, regarding people walking out with open containers, regarding the use of drugs and other type of conduct inside the bar?" (Question ask of James Grogan at Liquor license hearing 7/17/98; transcript page 101)

From the foregoing it is clear there is substantial evidence that, prior to the filing of this action, Nate's Cafe and James Grogan, personally, were aware of misdemeanor

and felony drug activity on the premises, either through the direct observation of an employee or through accusations and discussions at the liquor license hearing of the drug problem on and near the premises. There is further evidence from witnesses who observed Nate's Cafe. These witnesses opined that lax management was the cause of the drug problems, and that drug problems were much worse at the Elder Cafe than in other bars in the area.

Respondents have presented evidence to the effect that they have taken steps to prevent and/or control drug problems on the premises, and that the drug problems are exaggerated. Respondents have not denied that several felony drug violations have occurred on the premises in the months immediately preceding the filing of the verified petition in this matter. In fact, at page 13 of their reply, filed 7/30/99, respondents state that "It is undisputed that...only (sic!) five felony drug violations occurred inside the Elder Café."

There is evidence, therefore, to support each side's position pertaining to the injunction. The Court, as the aforesaid authority makes abundantly clear, cannot, upon a summary judgment motion to weigh evidence, assess its probative value, decide factual issues, or choose among reasonable inferences". Additionally, pursuant to Civil Rule 56(C) the Court must interpret the evidence "most strongly" in favor of relators.

The evidence before the Court is not such that reasonable minds can come to only one conclusion. Respondents' motion for summary judgment is not well-taken, and the same is denied.

RELATORS' MOTION FOR SUMMARY JUDGMENT FILED 6/15/99

This matter is also before the Court upon motion for summary judgment, filed 6/15/99, on behalf of relators.

This motion is denied for the reason that the Court has

already found that factual dispute exists as to the issues involved, and that this dispute cannot be resolved upon suaunary judgment motion.

RELATORS SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT, FILED 7/26/99

In the supplemental motion the City of Cincinnati seeks summary judgment in its favor against the 42 U.S.C. §1983 claims raised by respondents in their counterclaim.

The City of Cincinnati has been sued in its official capacity since it is not capable, of acting' in a personal capacity.

The following authority is pertinent:

> "Appellants brought suit in the United States District Court for the Southern District of Ohio, alleging claims under 42 U.S.C. § 1983 against the City of Cincinnati, Hamilton County, and certain County officers, in their official capacities, for their role in enforcing an injunction issued by Hamilton County Court of Common Pleas Judge Thomas Crush."
> *[Bachelier v. Hamilton County, Ohio:* Case No. 90-3725; U.S. Court of Appeals, Sixth Circuit; decided 4/30/91; unreported]

> "Additionally, appellants cannot prevail under 42 U.S.C. § 1983 because they cannot show that an official policy of defendants was the moving force behind their alleged constitutional violation. As the United States Supreme Court held in *Kentucky v. Graham,* 473 U.S. 159, 166 105 S.Ct. 3099, 87 L.Ed2d 114 (1985):

> "'To establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right...More is required in an official-capacity action, however, for a governmental entity itself is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation ***'.
>
> *"Here,* it is clear that Judge Crush's injunction, not any policy of appellees, was the moving force behind the alleged violation of appellants' constitutional rights. Appellees' decision to enforce a facially valid injunction does not subject them to Section 1983 liability. * * * Nor can the order of Judge Crush be imputed to Hamilton County as a policy since Judge Crush is a state, not a county, official." *[Ibid.,* Pages 5, 6]
>
> "The Court has held that § 1983 was not intended to abrogate a State's Eleventh Amendment Immunity." *[Kentucky v. Graham* (1985), 473 U.S. 159, 169; 105 S.Ct. 3099, 3107; 87 L.Ed.2d 114]

The facts of the instant matter are no different, in one essential respect, from those in *Bachelier.* In both cases, the city or county acted to enforce a facially valid injunction order signed by a State judge. In the instant matter, the Judge was presented with a motion for an injunction filed by the City. But the Judge used his own independent judgment in deciding whether or not to grant an injunction order. The moving force behind the injunction which did issue was, as *Bachelier* indicates, the Judge who issued it.

Relator City of Cincinnati is entitled to summay judgment on this issue.

MOTION FOR JURY TRIAL

This motion for jury trial was not argued at the hearing in question. The jury trial issue should properly be decided only after all dispositive pre-trial motions have been heard. The City, for example, states that it wishes to attempt to obtain leave to file a motion for summary judgment in favor of Sergeant Jeff Hunt. Whether a jury trial is a matter of right will depend upon what parties and what claims remain to be tried when all dispositive motions have been decided.

ENTRY AND SCHEDULING

A scheduling conference shall be held September 15, 1999, 8:30 A.M. At or before that time counsel shall present an entry or entries, properly endorsed, reflecting the granting and denying of motions as set forth above. The Court will, in the meantime, will have this decision filed and docketed.

Lisa Allen
Assistant City Prosecutor
Room 226, City Hall
801 Plum Street
Cincinnati, Ohio 45202
FAX: (513) 352-5217

Mark C. Vollman
Assistant City Solicitor
Room 214, City Hall
801 Plum Street Cincinnati, Ohio 45202
FAX: (513) 352-1515

Michael Bachman
Assistant Attorney General
1600 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
FAX: (513) 852-3454

Eric Holzapfel
C.J. Schmidt
Attorney at Law
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202
FAX: (513) 852-6087

APPENDIX F

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A9900996

February 25, 1999, entered

CITY OF CINCINNATI, ex rel.
CITY PROSECUTOR
TERRENCE R. COSGROVE
801 Plum Street Room 226
Cincinnati, OH 45202

and

STATE OF OHIO, ex rel.
1600 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202

RELATORS,

vs.

JEROME GROGAN
1829 Race Street
Cincinnati, Ohio 45210

and

NATE'S CAFE, INC.)
(A.K.A. ELDER CAFÉ))
128 West Elder)
Cincinnati, Ohio 45210)
c/o Jerome Grogan)
Statutory Agent)
1829 Race Street)
Cincinnati, Ohio 45210)
)
RESPONDENTS.)
_____)

JUDGE: THOMAS CRUSH

TEMPORARY RESTRAINING ORDER

This case came before the Court of this 30th day of July, 1998, on Relators' Application for Preliminary' Injunction filed with Relators' Verified Petition to permanently enjoin a nuisance; and on Relators' Motion for Ex Parte Temporary Restraining Order for closure of said premises. This action was brought by Relators under the authority of Revised Code §3719.10 which states:

> Premises or real estate, including vacant land, on which a felony violation of Chapter 2925 or 3719 of the Revised Code occurs constitute a nuisance subject to abatement pursuant to Chapter 3767 of the Revised Code.

Chapter 3767 sets out the parties, procedures, and evidentiary burdens in a nuisance abatement case.

For purpose of the tempory restraining order, the Court finds that the Relators have established the following facts:

This action was brought by Relator undder the authoity of Revised Code § 3719.10 which states:

> Premises or real estate, including vacant land, on which a felony violation of Chapter 2925 or 3719 of the Revised Code occurs constitute a nuisance subject to abatement pursuant to Chapter 3767 of the Revised Code.

Chapter 3767 sets out the parties, procedures, and evidentiary burdens in a nuisance abatement case.

For purpose of the Preliminary Injunction, the court finds that the Relator have established the following facts:

1. Respondents Jerome Orogan at all relevant times were, the owners and/or user of the property, located at 128 W. Elder, Cincinnati, Ohio. See, Exhibit A, attached.

2. Respondent Nate's Cafe (Elder Cafe) Inc. at all relevant times, was operating as a "bar" at the property located at 128 W. Elder, Cincinnati, Ohio. Jerome Grogan is the Statutory agent for Nate's Cafe.

3. The Cincinnati Police division has been monitoring the problems arising from illegal activity emanating from the Elder (Nate's Cafe). The Cafe has been cited to the Ohio Department of Liquor Control at least 2 in the last 24 months.

4. There have been multiple arrests at the Elder Cafe for drug related activity. On October 10, 1997 an undercover agent with the ODLC observed a female patron sell marijuana to another patron. The agent observed the seller, Miss Angela Gray, having a conversation with the bar manager, Calvin Johnson. During the converation Miss Gray had marijuana packages clearly visible on top of thc table at which she was seated.

5. On December 30, 1998 Tyrone Mallory was arrested for Trafficking in Drugs, for a sale to an undercover officer of 33.98 grams of marijuana, This offense occurred

inside the Elder Cafe.

6. On January 4, 1999 Rodney Bolden was murdered inside the Elder Café.

7. On January 26, 1999 there were two felony arrests and eleven misdemeanor arrests in the immediate area of the Elder Cafe. Recovered were 1.21. grams of heroin, percocet tablets, 6 methadone pills, and 42.18 grams of marihuana. On January 27, 1999 there were two arrests inside the Elder Cafe. Thirty bindles of heroin, (weighing 4.77 grams) were recovered on the floor of the bar. There was one felony drug abuse arrest for four percocet tablets and one minor misdemeanor arrest for marijuana. At the time two bartenders were on duty. Mr James Johnson and Mr. Vada Smith.

8. On January 27, 1999, Arthur Abbot was arrested for minor misdemeanor drug abuse. He was observed entering thc Elder Cafe, and the emerging five minutes later with the marihuana, Darrell Ballew was arrested in the bar for minor misdemeanor drug abuse.

9. Also on January 27, 1999, Ricky Dyer was arrested for Felony Drug Abuse (four percocet) inside the Elder Cafe.

10. On January 28, acting upon information provided by a confidential informant of a subject selling marijuana inside the bar, Michael Smith was arrested; 61.12 grams of marijuana were recovered.

11. On February 2, 1999 undercover officers entered the bar and within a half hour purchased marijuana and crack cocaine. Felony arrests of Soncha Newton, for Aggravated Trafficking, and Melvin Haygood, for two counts of Aggravated Trafficking. Also two minor misdemeanor arrests of Derrick Turner and Quentin Hardy.

12. On February 5, 1999 a confidential informant provided information that two subjects were inside the Cafe with marijuana. The two individuals described by the informant were observed leaving the Cafe. Titus Bell and Marvin Kelly were both arrested for minor misdemeanor drug abuse.

13. On February 10, 1999, a one hour surveillance in the area of the Cafe resulted in the arrest of Arthur Scott for Felony Drug Abuse (possession of tylenol with codeine). Alonzo Robinson was also charged with Felony Drug Abuse (possession of three bindles of heroin).

14. On February 12, surveillance of a crowd in front of the Elder Cafe resulted in the arrest of Jacob Drew for Felony Drug Abuse. Recovered was percocet. Jacob Drew had been observed entering the Cafe and emerging two minutes later.

15. Also on February 12, 1999, Patricia McDaniel parked at the corner of Elm and Elder. A male exited the Café and dropped a baggy in her car. McDaniel was subsequently stopped and found to be in possession of a syringe and a spoon with drug residue. She was arrested for possession of drug paraphanalia.

16. On February 15, 1999, several baggies of marijuana were recovered inside the Elder Cafe. The total weight of the marijuana was 65.59 grams.

17. On February 17, 1999 Katherine Hunter was arrested inside the Cafe for Drug Abuse. Recovered was 47.27 grams of marijuana.

18. On February 19, 1999 information was provided by a confidential informant of drug sales inside the Elder Cafe. Darrell Ballew and Prince Johnson were both arrested for minor misdemeanor drug abuse.

19. On 1998 there was a ODLC hearing concerning the renewal of the liquor license for the Elder Cafe. Jerome Grogan was present at that hearing.

20. During the hearing, several Cincinnati Police Officers as well as many members of the Findlay Market community testified as to the ongoing problems at the Elder Cafe.

21. Specifically, there was testimony presented as to the constant presence o f marijuana in the bar, as to the drug trafficking which occurred in October, 1997 and is described above, as well as the multiple complaints aired by the Elder Cafe's neighbors as to obvious drug transactions and general unruly and threatening behavior displayed by the Elder's "patrons."

22. Even though, by way of sworn testimony, Jerome Grogan was advised of the drug sales and unruly behavior at the Elder Cafe, he has done nothing to correct or address the problems.

23. Recently complaints from neighbors have increased due to continuing problems emanating from the Elder Cafe, and the incidents of drug abuse and drug trafficking continue.

24. Neighbors have expressed great concern for the safety of themselves, and patrons of the Findlay Market.

25. The property located at 128 W Elder, Cincinnati, Ohio (Elder "Nate's" Café), has a general reputation for felony drug transactions occurring there.

26. Continued illegal drug sales from 128 W. Elder, Cincinnati, Ohio will cause immediate and irreparable harm to the surrounding community and constitute exigent circumstances as required by Ohio R. Civ. P. 65 for the issuance of an ex parte temporary restraining order.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

The evidence presented that the hearing for the Ex Parte Temporary Restraining Order sustained the allegation of the petition that the premises at 128 West Elder, Cincinnati, Ohio, is dangerous and harmful to the health and safety of the community and is a nuisance pursuant to R.C. § 3719.10.

There being no showing that the nuisance has been abated, it is further Order of this Court that the premises be closed and padlocked or boarded as deemed necessary by the Cincinnati Police Department against its use for any prupose until a final decision is rendered on the Application for a Preliminary and Permanent Injunction, as required by R.C. § 3767.04. The Cincinnati Police Department may, however, authorize entry onto the premises to appropriate city inspectors, public utility crews, fire safety personnel, and law enforcement officials as it deems appropriate during the duration of this Order.

It is further offered that all personal property located in the premises shall be inventoried and that only necessary personal property located there shall be removed by the Occupants prior to closure and under the direction of the Cincinnati Police Department. The Cincinnati Police Department may, however, remove and secure at an off-site location highly mobile and valuable property, such as automobiles, cash, jewelry, and electronic equipment, which may be at risk of theft during the pendency of this Order.

This case is continued for further hearing on the merits on Relator's Application for a Temporary Injunction on the ____ day of _____, 1999 at _____ in Courtroom _____ of the Hamilton County Common Pleas Court, and this Order shall remain in effect until that time or as otherwise may be ordered by this Court.

The Cincinnati Police Department shall serve this Order upon Respondents, and shall effectuate the closing of said premises with forcible entry, and based upon the Affidavit of Sergeant Jeff Hunt, the Court finds that notice of entry upon the premises could create serious risk of physical harm to law enforcement officers or other authorized individuals in the execution of the ex parte Order.

IT IS SO ORDERED.

02/15/99 /s/
DATE JUDGE

PREPARED BY:
CITY PROSECUTOR
TERRENCE R. COSGROVE

/s/
LISA C. ALLEN (0016891)
Senior Assistant Prosecutor
City Hall Room 226
801 Plum Street
Cincinnati, Ohio 40202
(513) 352-5333

BETTY D. MONTGOMERY
ATTORNEY GENERAL

/s/
Michael Bachman
Assistant Attorney General
1600 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202

APPENDIX G

TITLE XXXVII [37] HEALTH -- SAFETY -- MORALS

CHAPTER 3767: NUISANCES INJUNCTIONS

§ 3767.03 Abatement of nuisance; bond.

Whenever a nuisance exists, the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation in which the nuisance exists; the prosecuting attorney of the county in which the nuisance exists; the law director of a township that has adopted a limited home rule government under Chapter 504. of the Revised Code; or any person who is a citizen of the county in which the nuisance exists may bring an action in equity in the name of the state, upon the relation of the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; the prosecuting attorney; the township law director; or the person, to abate the nuisance and to perpetually enjoin the person maintaining the nuisance from further maintaining it. If an action is instituted under this section by a person other than the prosecuting attorney; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; the attorney general; or the township law director, the complainant shall execute a bond in the sum of not less than five hundred dollars, to the defendant, with good and sufficient surety to be approved by the court or clerk of the court, to secure to the defendant any damages the defendant may sustain and the reasonable attorney's fees the defendant may incur in defending the action if the action is wrongfully brought, not prosecuted to final judgment, is dismissed, or is not maintained, or if it is finally decided that an injunction should not have been granted. If it is finally decided that an injunction should not have been granted or if the action was wrongfully brought, not prosecuted to final

judgment, dismissed, or not maintained, the defendant shall have recourse against the bond for all damages suffered, including damages to the defendant's property, person, or character, and for the reasonable attorney's fees incurred by the defendant in defending the action.

Any agency, officer, or other person bringing an action under this section against the holder of a liquor permit issued under Chapter 4303. of the Revised Code shall notify the division of liquor control, the liquor control commission, and the liquor enforcement division of the department of public safety regarding the action at the time of bringing the action.

HISTORY: GC § 6212-3; 107 v 514, § 3; Bureau of Code Revision, 10-1-53; 144 v H 343 (Eff 6-1-92); 146 v H 501 (Eff 11-6-96); 147 v H 402 (Eff 3-30-99); 148 v H 187. Eff 9-20-99.

APPENDIX H

TITLE XXXVII [37] HEALTH -- SAFETY -- MORALS

CHAPTER 3767: NUISANCES INJUNCTIONS

§ 3767.04 Procedure in injunction action.

(A) The civil action provided for in section 3767.03 of the Revised Code shall be commenced in the court of common pleas of the county in which the nuisance is located. At the commencement of the action, a complaint alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

(B)(1) After the filing of the complaint, an application for a temporary injunction may be filed with the court or a judge of the court. A hearing shall be held on the application within ten days after the filing.

(2) If an application for a temporary injunction is filed, the court or a judge of the court, on application of the complainant, may issue an ex parte restraining order restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where the nuisance is alleged to exist until the decision of the court or judge granting or refusing the requested temporary injunction and until the further order of the court. The restraining order may be served by handing it to and leaving a copy of it with any person who is in charge of the place where the nuisance is alleged to exist or who resides in that place, by posting a copy of it in a conspicuous place at or upon one or more of the principal doors or entrances to that place, or by both delivery and posting. The officer serving the restraining order forthwith shall make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining the

nuisance. Any violation of the restraining order is a contempt of court, and, if the order is posted, its mutilation or removal while it remains in force is a contempt of court, provided the posted order contains a notice to that effect.

(3) A copy of the complaint, a copy of the application for the temporary injunction, and a notice of the time and place of the hearing on the application shall be served upon the defendant at least five days before the hearing. If the hearing then is continued on the motion of any defendant, the requested temporary injunction shall be granted as a matter of course. If, upon hearing, the allegations of the complaint are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. Except as provided in division (C) of this section, if at the time of granting the temporary injunction it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless that person shows to the satisfaction of the court or judge that the nuisance complained of is abated or that he proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge forthwith shall issue an order closing the place against its use for any purpose of lewdness, assignation, prostitution, or other prohibited conduct until a final decision is rendered on the complaint for the requested permanent injunction. Except as provided in division (C) of this section, the order closing the place also shall continue in effect for that further period any restraining order already issued under division (B)(2) of this section, or, if a restraining order was not so issued, the order closing the place shall include an order restraining for that further period the removal or interference with the personal property and contents located in the place. The order closing the place shall be served and an inventory of the personal property and contents situated in the place shall be made and filed as provided in division (B)(2) of this section for restraining orders.

(C) The owner of any real or personal property closed or restrained or to be closed or restrained may appear in the court of common pleas between the time of the filing of the complaint for the permanent injunction described in division (A) of this section and the hearing on the complaint, and, if all costs incurred are paid and if the owner of the real property files a bond with sureties approved by the clerk, in the full value of the real property as ascertained by the court or, in vacation, by the judge, and conditioned that the owner of the real property immediately will abate the nuisance and prevent it from being established or kept until the decision of the court or judge is rendered on the complaint for the permanent injunction, the court or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of the personal property as a nuisance and that, with reasonable care and diligence, the owner of the personal property could not have known of its use as a nuisance, shall deliver the real or personal property, or both, to the respective owners and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing the real property or restraining the removal or interference with the personal property. The release of any real or personal property under this division shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

HISTORY: GC § 6212-4; 107 v 514, § 4; Bureau of Code Revision, 10-1-53; 144 v H 343. Eff 6-1-92.